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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

DELTA AIR LINES, INC.,
Petitioner

v.

CIVIL AERONAUTICS BOARD, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Delta Air Lines, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on October 23, 1973.

OPINION BELOW

The opinion of the court of appeals is not yet reported. The opinion, and the court's order filed November 20, 1973 *sua sponte* amending the opinion, are set forth in Appendix A.[1]

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[1] Appendices A, B, C, D and E are set forth in an accompanying volume pursuant to permission granted by Rule 23(i). Citations thereto will be to the specific Appendix and the page of the accompanying volume.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1973 (Appendix B).

The petition of Delta Air Lines, Inc. for rehearing was denied by the court of appeals on November 20, 1973.

The jurisdiction of this Court is invoked under 49 U.S.C. 1486(f) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the *Ashbacker* doctrine[2] of fair comparative hearing is applicable to airline route cases, and, if so, whether the Civil Aeronautics Board may *sua sponte* design a new route proceeding within a previously well defined area of the country, refuse to consolidate or even hear one airline's applications for new route authority within that area, and thereafter award a route to another airline in predominant measure upon the basis of the traffic flowing over routes encompassed by the excluded applications, when it is clear that such traffic will not, as a matter of economic fact, support operations by two airlines, now or in the foreseeable future.

STATUTE INVOLVED

Sections 401(a), (b) and (c) of the Federal Aviation Act (72 Stat. 754, 49 U.S.C. 1371 (a), (b) and (c)) provide:

> Certificate of public convenience and necessity—Essentiality
>
> "(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued

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[2] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

by the Board authorizing such air carrier to engage in such transportation."

Application

"(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require."

Notice of application; filing of protest or memorandum; hearing

"(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible."

STATEMENT

This controversy arises out of the so-called Southern Tier Competitive Nonstop Investigation, an administrative proceeding initiated by the Civil Aeronautics Board ("Board") *sua sponte* in 1967, primarily to reexamine the essentially noncompetitive route structure established six years earlier by the Board's decision in the Southern Transcontinental Service Case.

Prior to 1961 there had existed no single-carrier transcontinental air service across the southern United States, but such service was provided by a series of "interchange flights", in which a single aircraft was operated across country by the personnel of successive airlines with adjoining routes. Single-carrier service was first authorized

by the Board in the Southern Transcontinental Service Case, 33 C.A.B. 701 (1961) ("Southern Transcontinental"). That case was concerned with an integrated area comprised of nine states: Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, New Mexico, Arizona and California.

This nine state "southern tier" area was forged by the Board in the course of the decisional process, in large part as a result of the Board's own concern (30 C.A.B. 71-72 (1958)) for the proper application of the doctrine of *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327. In the end, the Board included within the scope of the Southern Transcontinental case the possibility of authorizing new airline service to and from virtually all of the major cities in the southern tier area, including the four cities most specifically at issue here: San Antonio, El Paso, Albuquerque and Phoenix.

At the conclusion of the Southern Transcontinental case, in 1961, the Board made new route awards across the southern tier, including awards of southern transcontinental authority to petitioner Delta Air Lines, Inc. ("Delta") and to National Airlines, Inc. ("National"); it also made an award to Continental Air Lines, Inc. ("Continental") of a route between Los Angeles and Houston by way of Phoenix, El Paso and San Antonio. Although the Board's Examiner had recommended that Albuquerque and Phoenix be included in Delta's southern transcontinental route, and although Delta had earlier participated in this traffic through interchange flights, the Board did not include such authority in Delta's new certificate (33 C.A.B. at 719).

In 1967, only six years after the final decision in Southern Transcontinental, the Board once again turned its attention to the needs of the public for east-west service in the southern tier. Although these 1967 pro-

ceedings included cities in eight of the nine "southern tier" states (excepting only Mississippi), as well as routes and traffic throughout the area, this time the Board selected specific markets for consideration and separated them into four different administrative proceedings. In this Southern Tier Competitive Nonstop Investigation ("Southern Tier"), the Board placed in issue 18 city-pairs (markets):

(1) Miami-Tampa
(2) Miami-New Orleans
(3) Miami-Houston
(4) Miami-Dallas
(5) Miami-Los Angeles
(6) Miami-San Francisco
(7) Tampa-New Orleans
(8) Tampa-Dallas
(9) Atlanta-Dallas
(10) Atlanta-Los Angeles
(11) Atlanta-San Francisco
(12) New Orleans-Dallas
(13) New Orleans-Los Angeles
(14) New Orleans-San Francisco
(15) Dallas-Los Angeles
(16) Dallas-San Francisco
(17) Houston-Los Angeles
(18) Houston-San Francisco

Second, in the Dallas/Fort Worth-Phoenix Nonstop Case (C.A.B. Docket No. 18579) ("Dallas-Phoenix"), a single market was directly involved:

(19) Dallas-Phoenix

Third, in the Service to Albuquerque Case (C.A.B. Docket No. 18586) ("Albuquerque"), the Board placed in issue the following pairs of cities:

(20) Albuquerque-San Francisco
(21) Albuquerque-Los Angeles
(22) Albuquerque-Chicago
(23) Albuquerque-Las Vegas
(24) Albuquerque-Dallas

Finally, in the Memphis/Huntsville/Birmingham-Los Angeles Investigation (C.A.B. Docket No. 19023) ("Memphis/Huntsville"), commenced a few months later, the following city-pairs were directly at issue:

(25) Memphis-Los Angeles
(26) Huntsville-Los Angeles
(27) Birmingham-Los Angeles

Promptly after the institution of the Southern Tier case, Delta moved to consolidate the Dallas-Phoenix, Al-

buquerque and Memphis/Huntsville cases therewith and to expand the scope of the case also to include other southern tier markets, for which Delta separately filed two formal applications under Section 401(b) of the Federal Aviation Act.[3] One of the routes thus applied for by Delta was between Miami in the east and San Francisco and Los Angeles in the west, via intermediate points which included Houston, San Antonio, El Paso, Albuquerque and Phoenix. (If granted, this application would have enabled Delta to provide nonstop, one-stop, and multi-stop service in each of the San Antonio-Miami, El Paso-Miami, Albuquerque-Miami and Phoenix-Miami local markets.) Delta's motion, and all similar motions by other airlines, were denied by the Board except to the extent that the routes sought were already included in the Southern Tier case. Hereinafter the phrase "excluded applications" means Delta's applications above-described, and "excluded area" is used to refer to that part of the southern tier area encompassing San Antonio, Albuquerque, El Paso and Phoenix, particularly in the context of service to Miami via Houston.

On October 30, 1967, Delta (and National) petitioned the United States Court of Appeals for the District of Columbia Circuit for judicial review of the order by which the Board had thus refused to expand the scope of the Southern Tier case and had denied consolidation of Delta's "excluded applications".[4] The court of appeals dismissed these petitions for lack of jurisdiction at that time, but concluded:

> "*Ashbacker* does not necessarily require the Board to enlarge a proceeding to include abutting segments

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[3] 72 Stat. 754, 49 U.S.C. 1371(b).

[4] Before these petitions came on for hearing, the Board itself eliminated a restriction imposed upon the Dallas-Phoenix case, with the result that Delta eventually was awarded the single route at issue therein.

> or prohibit the Board from considering in a separate proceeding an area that borders on, or even lies wholly within, the area covered in another proceeding. It may be that simultaneous investigation of contiguous areas does violate *Ashbacker*, but that depends on the considerations adduced by the Board in making its award."

National Airlines, Inc. v. *Civil Aeronautics Board*, 392 F.2d 504, 510 (C.A.D.C.).

Insofar as the route Houston-Miami is concerned, the following material shows, Delta submits, that the considerations eventually adduced by the Board in awarding the route to Continental did violate Delta's rights under the *Ashbacker* doctrine.

The Southern Tier case was subsequently tried before a Board Examiner (now called an "Administrative Law Judge"), with Delta introducing *Ashbacker*-type evidence to demonstrate mutual exclusivity between the routes placed in issue by the Board and Delta's excluded applications. Insofar as Houston-Miami service was involved, the Examiner recommended certification of Continental from Houston to Miami upon the basis of public benefits to the "excluded area"—which would thereby receive new single-carrier service to Miami by virtue of Continental's pre-existing authority over the route Los Angeles-Phoenix-El Paso-San Antonio-Houston plus its ability under standard Board practice to "tack" its proposed Houston-Miami authority to that existing authority.

The *Ashbacker* problem resulting from this recommended award was called to the Board's attention by Delta. Although the resulting Southern Tier opinion (C.A.B. Order 69-7-135 (1969)) purported to dismiss Delta's *Ashbacker* objections, the *Ashbacker* problem was not directly faced by the Board because the decision itself contained not one award to an airline whose routes

were such as to raise problems of mutual exclusivity with Delta's excluded applications. Indeed, in that 1969 decision, the Board awarded the Houston-Miami route not to Continental, but to Delta.

On October 17, 1969, Continental sought judicial review in the United States Court of Appeals for the District of Columbia Circuit of the Board's award of Houston-Miami rights to Delta, on the ground that the decision was inconsistent with the Dallas-Phoenix case decided the same day, in which Delta had also prevailed. The court of appeals vacated the Houston-Miami award,[5] on the ground that the Board had not adequately explicated its reasons for the selection of Delta (*Continental Air Lines.* v. *Civil Aeronautics Board*, 443 F.2d 745 (C.A.D.C.)). Pursuant to the court's permission, the Board authorized Delta to continue service over the route by exemption *pendente lite.*

While the Southern Tier case was before the court of appeals, on September 21, 1970, the Board on the basis of its procedural regulations dismissed as stale Delta's "excluded applications", which by then had lain for three years without action having been taken thereon by the Board. Delta's excluded applications thus never received a hearing in any proceeding.

Following remand of the Southern Tier Houston-Miami award by the court of appeals, the Board, although not require to do so, ordered a new evidentiary hearing before a new Administrative Law Judge. At the hearing Delta reintroduced up-dated *Ashbacker* evidence of mutual exclusivity, showing that the traffic in the markets involved in a Phoenix-Albuquerque-El Paso-San Antonio-Houston-Miami route could not then or for many years to come support an award to Delta if Houston-Miami

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[5] The other 17 awards made by the Board in the Southern Tier case were not judicially challenged, and went into effect.

authority were awarded to Continental in this proceeding. (This evidence, of course, could not be offered and was not received in support of Delta's application for the Houston-Miami route itself.) Despite Delta's *Ashbacker* showing, the Administrative Law Judge recommended an award to Continental, based on its frequency of schedules in the Houston-Miami market and beyond-area benefits. He purported to reject Delta's *Ashbacker* contentions, on the grounds that nonstop service by Delta [6] would be manifestly superior to Continental's one-stop authority—but without any analysis of the traffic available to support such competitive services.

The Board selected Continental for the Houston-Miami route precisely because of its "beyond area benefits" (primarily to the "excluded area") and the attendant greater frequency of service in the Houston-Miami market. The Board expressed the reasons for its award to Continental in these terms:

> "Our choice of Continental for a Houston-Miami award is predicated primarily on the fact that it will bring greater service benefits than any other applicant to the primary market and offer superior beyond-area advantages as well."

Order 73-2-89 (App. C, p. 28), and:

> "As we have observed, Continental can offer a more extensive pattern of Houston-Miami nonstop frequencies—four daily round trips—than any other carrier. It can support this level of service because of its substantial pool of support traffic west of Houston."

Id., p. 30, again:

> "Specifically, the dissent's computations include only local and interline connecting passengers in the

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[6] Delta had *not* limited its application to only nonstop authority, see p. 6, *supra*.

> Houston-Miami market and wholly disregard the extensive pools of on-line support traffic available to Continental west of Houston. In effect, this approach seems to ignore *the very factor which has led us to select Continental*—namely the substantial beyond area traffic support that will enable the carrier to provide more Houston-Miami frequencies and greater beyond benefits than any other applicant."

Id., pp. 34-35 (emphasis added).

The Board rejected Delta's *Ashbacker* arguments, primarily upon its interpretation of the law and also upon the factual assertion and unprecedented basis that the markets for which Delta had applied were then too small to support service by even one carrier.[7]

Delta again petitioned for judicial review to the United States Court of Appeals for the District of Columbia Circuit. The court affirmed the Board on the grounds that the *Ashbacker* doctrine could not be applied so as to impair the considerable measure of discretion that the Board must retain in defining the scope of air route cases, that the Board is not required to tailor its proceedings so as to equalize the advantages and disadvantages with which every applicant enters a new route proceeding, and that Continental's beyond-area benefits to the "excluded points" had not loomed large in the Board's decision. Delta's excluded applications were characterized by the court as "defensive route applications" which should not be encouraged.

The court thus rejected Delta's contentions as to (1) the decisional importance given by the Board to Continental's proposed new services between Miami and the "excluded area points", and (2) the Board's position that

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[7] See the Board's Opinion and Order 73-2-89 (App. C, p. 36). See also Opinion and Order on Reconsideration 73-5-22 (App. D, pp. 64-66).

it is entitled to *disregard* what it characterizes as defensive route applications. Thus, as to point (1), Continental's service to the "excluded area" points, the court said in its October 23 opinion:

> "They were taken into account as a modest aspect of the entire case."

App. A, p. 12; and as to point (2) it said:

> "Nor can we open the door to an equalization approach that would encourage all kinds of defensive route applications. The Board must act realistically in terms of existing route identification and business patterns."

Id., p. 13.

Delta petitioned for rehearing and suggested the appropriateness of rehearing *in Banc*. In its petition, Delta laid heavy emphasis on the opinion's failure even to cite one of the court's own leading cases—*Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 275 F.2d 632 (C.A.D.C.), *cert. denied*, 362 U.S. 969 (*"Second Delta"*). Delta urged that the court's reading of the Board's treatment of the beyond-area benefits to the "excluded points" as only a "modest aspect of the entire case" was directly contrary to the Board's own statement that excluded area traffic was "*the very factor* which led [it] to select Continental".[8] The petition for rehearing was denied by an order filed on November 20, 1973, but simultaneously the court issued, *sua sponte*, an order amending its original opinion as follows:

"Page 12, second paragraph, omit the following:

> 'They were taken into account as a modest aspect of the entire case. The Board, however, remained focused . . .'

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[8] See the quote from the Board's opinion at p. 10, *supra* (emphasis added).

Substitute the following:

> 'That is to say, this is not a case where Continental had no advantage over the competing carriers in terms of Houston-Miami service, and was awarded the route because of the beyond-area benefits. The Board was primarily focused . . .' "

App. A, pp. 17-18. This substituted language only served to emphasize the court's failure to follow, distinguish, or even cite its own opinion in *Second Delta*, *supra*, which amounted to a *sub silentio* overruling thereof.

REASONS FOR GRANTING THE WRIT

Although this Court has not yet considered the application of the *Ashbacker* doctrine to airline new route cases, the question has arisen in a number of cases in the circuit courts of appeals. Therein the airlines' right to a fair comparative hearing on mutually exclusive applications for new routes has been declared, and in several cases has been found to have been improperly denied by the Board. The United States Court of Appeals for the District of Columbia Circuit, we submit, failed to apply this Court's *Ashbacker* doctrine to the facts of the case below and, by failing to reconcile or even cite the leading decision in which *Ashbacker* rights were held violated, has cast serious doubt on the validity and applicability of that doctrine to airline cases. It is appropriate for this Court to consider through a writ of certiorari the precedent of the *Ashbacker* doctrine and assess its current vitality as applied to air route cases.

Furthermore, the court below has also sanctioned administrative procedures under which the Civil Aeronautics Board may initiate new route proceedings *sua sponte* and may, by predetermining with selective particularity what routes may be contended for therein, determine precisely what advantages and disadvantages the airlines

competing for these routes will enjoy in the subsequent proceeding, but may nevertheless refuse to consolidate or even to hear applications for logically related and mutually exclusive routes.

It is essential for this Court to rule on the applicability and scope of the *Ashbacker* doctrine because it is a general rule of law in route proceedings conducted by the Civil Aeronautics Board. There is probably no more basic doctrine with respect to route proceedings in terms of contentions before the Board and the courts of appeals; it is a doctrine that pervades the scope of practically every airline route case; but the boundaries have yet to be set by this Court. The uncertainty of those boundaries is a matter of continuing concern to both the Civil Aeronautics Board and the carriers in administrative proceedings, witness the contention of Continental Air Lines (an intervenor below) with respect to the application of *Ashbacker* to similar facts, in a brief dated December 21, 1973, as set forth in Appendix E.[9] Reference to the argument contained therein demonstrates that basic issues of fair comparative hearing in air route cases are a continuing matter and should be settled by this Court.

ARGUMENT

I. THE *ASHBACKER* DOCTRINE REQUIRES FAIR COMPARATIVE HEARINGS ON MUTUALLY EXCLUSIVE APPLICATIONS.

Under the doctrine of *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, an administrative agency which is required by statute to grant

[9] Continental's contentions are of value in respect of reasons for granting a writ of certiorari herein only because Continental now not only supports before the Board the very *Ashbacker* argument raised by Delta herein and contested by Continental below, but Continental relies on *Second Delta* for the same proposition urged by Delta below.

the benefit of a hearing to applicants for licenses, must grant a comparative hearing to applications that are "mutually exclusive". Mutual exclusivity exists in situations wherein a prior consideration of one application would substantially narrow the possibility that the agency could subsequently award the other application.

It has been established in the courts of appeals that the *Ashbacker* doctrine applies to route proceedings before the Civil Aeronautics Board. In *Second Delta, supra*, the court said:

> "If the grant of one of several applications for a new route does as a matter of economic necessity, preclude the grant of any other application, the doctrine of Ashbacker clearly applies. Likewise, if the foreseeable traffic would support two carriers and there are, let us say, five applicants the grant of any one is an effective denial of three of the remaining four applications, and Ashbacker applies."

275 F.2d at 638.

Section 401 of the Federal Aviation Act[10] accords a public hearing to every applicant for a certificate of public convenience and necessity for a new airline route; in particular, Section 401(c) gives this right as to applications for new routes. This right to a hearing is guaranteed by the "due process clause" of Amendment V to the Constitution of the United States.

Application of the *Ashbacker* doctrine to the complexities of modern air transportation presents many problems, as the court of appeals itself noted in *Second Delta*:

> ". . . It is true, as the Board argues, that the application of the Ashbacker doctrine to awards of airplane routes presents many difficulties not in the radio cases. We pointed this out in *Eastern Air*

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[10] 72 Stat. 754, 49 U.S.C. 1371.

Lines v. *Civil Aeronautics Board.* We now iterate the doctrine there stated; the Board must have a considerable measure of discretion in limiting the areas to be considered in its air-route cases. But at the same time we emphasize that *the Board cannot, either intentionally or by the demonstrable effect of an order, avoid what is now known as the Ashbacker doctrine.*"

275 F.2d at 637 (emphasis added).

The *Ashbacker* doctrine is not a technicality, but a practical conclusion of sound common sense. As the court of appeals said in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 228 F.2d 17 (C.A.D.C.) (*"First Delta"*):

> "The Board says the only right of Delta is to have the issue of exclusivity decided before a *grant* of Eastern's application. It so construes the Ashbacker doctrine. We think such an interpretation would reduce the rule of that case to an empty shell, all form and no substance. * * * We read Ashbacker as a rule of substance and not as a mere prescription of form."

228 F.2d at 21.

II. THE DECISION BELOW INVOLVES FUNDAMENTAL ISSUES CONCERNING THE ADMINISTRATION OF THE HEARING PROVISIONS OF THE FEDERAL AVIATION ACT IN AIRLINE ROUTE CASES WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

As in the original *Ashbacker*[11] decision of this Court, the competing interests which bring the doctrine of that case into play in the context of air route proceedings are fundamental and substantial. They are, on the one hand, the conceded power of the agency to structure its proceed-

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[11] *Ashbacker Radio Corp.* v. *F.C.C., supra.*

ings in furtherance of the efficient conduct of its statutory functions and, on the other, the statutory right of an applicant to a fair hearing.[12] This conflict was resolved in the case at bar in favor of the agency, erroneously, we submit, and with far-reaching implications that threaten to erode the right to a hearing in future air route proceedings under the Federal Aviation Act.

A. The Right Of An Airline To File Responsive Route Applications, Supported By The *Ashbacker* Doctrine In Appropriate Cases, Is Vital To A Fair Comparative Hearing. The Right Was Unnecessarily Abridged By The Decision Below In A Manner That Finds No Warrant In The Statute.

The court below accepted the Board's contentions that it must retain considerable discretion in defining the scope of air route cases (App. A, p. 10)—a proposition which Delta does not contest—*and* that the Board is therefore entitled to disregard what it characterizes as "defensive" route applications (App. A, p. 13)—a proposition Delta strongly challenges. In so doing, we submit, the court went much further than it apparently realized in stripping the *Ashbacker* doctrine of vitality for air route cases.

The court thereby gave sanction to Board procedures under which new route applications in conflict with the Board's "prior-to-hearing" concept of how the air transportation system should be expanded, can *never* receive the hearing which Congress has decreed it *shall* receive "as speedily as possible" (Section 401(c)).[13] This result

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[12] Section 401 of the Act, 49 U.S.C. 1371, guarantees a hearing to an applicant for a new airline route as well as a hearing before a certificate previously granted may be amended, modified, suspended or revoked. In the latter context, this Court had occasion to emphasize the importance of the right to hearing in *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316.

[13] 49 U.S.C. 1371(c).

flows from the Board's dual practices (followed by it below) of (a) initiating new route cases *sua sponte*, and (b) dismissing an airline's applications as stale without a hearing ever having been had thereon,[14] neither of which finds any support in the Federal Aviation Act.

The assertion that Delta's excluded applications were "defensive" [15]—even if true—cannot make them any less worthy of *Ashbacker* protection, notwithstanding the suggestion implicit in the court's opinion that this should be the case.

The point to which the court did not address itself is that when the Board commences a new route case *sua sponte*, as it did here, and itself selects specific route segments to be competed for, the right of airlines to submit responsive applications is absolutely vital to a fair hearing and to the administration of the Federal Aviation Act.

Section 401(b) of the Act [16] specifies that new certificates of public convenience and necessity shall be initi-

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[14] See, 14 C.F.R. § 302.911.

[15] Delta, in any event, questions the validity of this characterization, the use of which, we submit, is indicative of the court's failure to grasp and fairly resolve the real competing interests involved. It should be pointed out that: (1) in the Southern Transcontinental case, instituted in 1958, Delta sought authority to serve El Paso, Tucson, Phoenix, Albuquerque and San Antonio; (2) the Board's Examiner recommended Delta's certification at Albuquerque, Tucson and Phoenix on a route to the west coast (33 C.A.B. at 926); and (3) after the Board denied Delta authority at these intermediate points (33 C.A.B. at 719) and stated that it was deciding the southern tier air transportation route pattern for the foreseeable future (33 C.A.B. at 73), Delta took the first opportunity offered to seek authority at those points earlier denied it—namely, at the time the Board instituted the case below. Delta had and has a continuing affirmative interest in serving the excluded area points and its application, therefore, cannot properly be characterized as "defensive".

[16] 49 U.S.C. 1371(b).

ated by written application by the prospective carrier. There is in Section 401(b) no provision like that found in Section 401(g),[17] permitting the Board to act upon its own initiative with respect to modifications of a carrier's existing route.

Despite this seemingly clear statutory scheme, the Board frequently commences new route proceedings of its own initiative, and indeed did so here.

Coupled with this assertion of the right itself to institute new route cases, is the Board's assertion of the right not to pass on applications properly filed by the airlines. Section 401(c) of the Act[18] specifies:

> "Such application [for a certificate] *shall* be set for a public hearing, and the Board *shall* dispose of such application as speedily as possible." (emphasis added)

Despite this command, the Board has decreed (in Section 302.911 of its Rules of Practice, 14 C.F.R. § 302.911) that it may neglect new route applications, let them slumber unheard for three years, and then dismiss them as stale.[19] The Board did so here with Delta's "excluded applications".

The 18 discrete markets in issue in the Southern Tier case (see p. 5, *supra*) were designated by the Board, not by any applicant. If the Board is allowed to institute and frame new route proceedings by deliberate se-

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[17] 49 U.S.C. 1371(g).

[18] 49 U.S.C. 1371(c).

[19] The Board recently has amended further its regulation to provide that a route application properly filed can be dismissed without hearing as "likely to become stale", if the Board denies a motion for expeditious hearing on such application. 38 F.R. 24894, September 11, 1973.

lection of particular segments,[20] and *if*, most or all routes are to be awarded to the carrier which exhibits the greatest beyond-benefits, administrative dangers lurk in the court's uncritical iteration that:

> ". . . [P]re-existing certificates do give an advantage to certain applicants for a new segment, but that is not inherently unfair."

App. A, p. 13.

Against the background of these administrative practices, the airlines must have the right to file responsive route applications whenever the Board itself either initiates a proceeding or redefines an application submitted to it. Absent such a right, there is no way the carrier can hope to have its own application properly before the Board at the critical time (*i.e.*, when related applications are scheduled for hearing), both to protect the carrier's own interest and as a means of pointing out to the Board how the scope of a proposed investigation might be improved in the public interest.

B. The Decision Below Overruled *Second Delta* Without Any Explanation Whatever; There Is No Significant Distinction Between This Case And *Second Delta* In Terms Of The Emphasis Placed By The Board On Beyond-Area Benefits.

In *Second Delta*, the excluded applications were between the west coast and the southeast. TWA had preexisting authority between St. Louis and the west coast, and obtained St. Louis-southeast rights. The emphasis given by the Board to the "beyond-area" benefits which TWA could provide over its existing routes west of St. Louis is shown by the court's opinion in *Second Delta*

[20] In the past, the Board has often set down area-type proceedings while excluding applications for out-of-area routes—an approach upheld by the courts so long as the area is a reasonable one (see *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 243 F.2d 607 (C.A.D.C.)). That, however, was not the Board's approach below.

which in turn quoted the Board's decision in the St. Louis-Southeast Service Case, 27 C.A.B. 342 (there under judicial scrutiny) to the effect that:

> "It was the carrier's ability to provide these 'beyond-area' benefits that was responsible for our selection of TWA as the carrier to perform the *St. Louis-Southeast* services that were found to be required by the public convenience and necessity."

275 F.2d at 637.

Other quotations from the St. Louis-Southeast decision show that benefits in the local markets under consideration were stressed by the Board to at least the same extent as in the case at bar:

> "As indicated previously, we have selected TWA to provide the needed service over the St. Louis-Southeast route we are authorizing herein. We do so because we are convinced that TWA will provide substantially greater public benefits than any of the other applicants."

27. C.A.B. at 347 (footnote omitted).

* * * * *

> "Aside from seasonal factors, the end-on integration of the extension from St. Louis to the Southeast with that portion of route 2 extending west of St. Louis *will permit* TWA to combine the traffic flow to and from cities east and west of St. Louis so as *to support maximum frequencies in the St. Louis-Southeast markets and better develop the traffic potential in this area.*"

Id. at 348 (emphasis added).

* * * * *

> "In view of the growing importance of the southeast area, both from an economic and a national defense standpoint, as well as the increasing volume of traffic exchanged between the Southeast and cities

> west of the Mississippi, we see no reason on the present record to deny the traveling public the additional single-plane frequencies that TWA will be able to offer over and above current interchange services."

Id. at 350.

* * * * *

> ". . . we are not deciding on the basis of the present record whether direct one-carrier southern transcontinental non-stop or multi-stop service is required by the public convenience and necessity nor could we properly do so."

Id. at 351.

Despite these recitations by the Board of "reliance" on benefit to the local market at issue, the court in *Second Delta* recognized the improper reliance on beyond-area benefits in violation of the rights of other carriers with applications pending for routes to and from the beyond points. Thus, in *Second Delta*, the Board's recitation on the benefits offered by TWA in the local market was *not* accepted by the court as determinative of the *Ashbacker* issue.

In the case at bar, the Board gave equal or even greater emphasis to such beyond-area benefits, calling them *"the very factor"* leading to Continental's selection (see the full quotation at p. 10 of this Petition, *supra*). As a practical matter, then, there is no distinction between the case at bar and *Second Delta* in terms of the weight given to beyond-area benefits, compared with the weight given to service benefits offered over the routes directly in issue. The court below, therefore, either erred in its assessment of the *Ashbacker* aspects of the Board's decision herein or sapped the *Ashbacker* doctrine of any vitality as applied to air route cases, *all* without even mention—much less discussion—of *Second Delta*.

III. AFFIRMATION BY THIS COURT OF THE CONTINUING VITALITY OF THE *ASHBACKER* DOCTRINE IN AIR ROUTE CASES WILL NOT ENCROACH UPON THE BOARD'S DISCRETION TO LIMIT THE AREAS TO BE CONSIDERED IN AIR ROUTE CASES.

Reading the opinion of the court below, it is a fair conclusion that the court was most impressed by the Board's urging that a contrary result would permit the expansion of new route cases beyond manageable limits, and that this danger alone is sufficient to distinguish or render obsolete the ruling of law in *Second Delta*[21] or justify narrowing the protections heretofore afforded by it in furtherance of this Court's decision in *Ashbacker*.

There are, however, a number of reasons why application of *Ashbacker* to the facts at bar would not produce a dangerous precedent, in terms of threat to the administrative process. These reasons were fully urged to the court below.

First, Delta's excluded application lay totally within the geographic area covered by the 18 markets specifically included by the Board within the scope of the Southern Tier proceeding.

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[21] It should be noted that the facts at bar present an even stronger case for application of the *Ashbacker* doctrine of fair hearing than did those in the *Second Delta* case ignored by the court below. There the excluded applications were (at the time of the Board's award to TWA) pending before the Board in another proceeding. The only issue posed, therefore, was whether the prior award to TWA would "dry up" some or all of the traffic available to support and justify awards to other airlines in the later proceeding.

The same issue is posed herein, of course, as it is in all *Ashbacker* cases. But there is an additional aspect of unfairness here, because Delta's excluded applications are not being heard in any proceeding and, indeed, have been dismissed by the Board *without any hearing ever having been had.*

Second, Delta's excluded application involved cities which the Board had in earlier proceedings determined must of necessity be considered as part of an integral area—thus requiring simultaneous consideration—in order to avoid *Ashbacker* problems.

Third, Delta's excluded application would have enabled Delta to provide service which had once existed (and in which Delta had then participated through interchange service) but which the Board a few years earlier had ordered discontinued. It is this service which Continental can now provide—even though Delta has not been given an opportunity to try an application for it.

Fourth, if (contrary to Delta's view) the main point upon which the Board focused *was* the service to be offered by Continental between Miami and Houston, the *Ashbacker* problem could have been avoided by an appropriate restriction on Continental's authority. The Board did this in the case of TWA (31 C.A.B. 377) after remand in *Second Delta*, *supra*.

Finally, when the Board *sua sponte* initiates a new route case and handpicks the points to be contended for, it must accept the possibility that some expansion of the scope of the case may be forthcoming for the sake of fairness.

For the foregoing reasons, the possibility of rendering future administrative proceedings unwieldy does not exist in sufficient degree to justify the erosion of the right to hearing that results from the decision below.

CONCLUSION

The decision below raises an important question of administrative procedure which bears directly upon the rights of competing air carriers to obtain fair and comparative consideration by the Civil Aeronautics Board of applications properly filed by them. Delta believes that the decision below is in error and that it conflicts with this Court's decision in *Ashbacker* as well as with other decisions of the courts of appeals. The petition for certiorari should be granted.

Respectfully submitted,

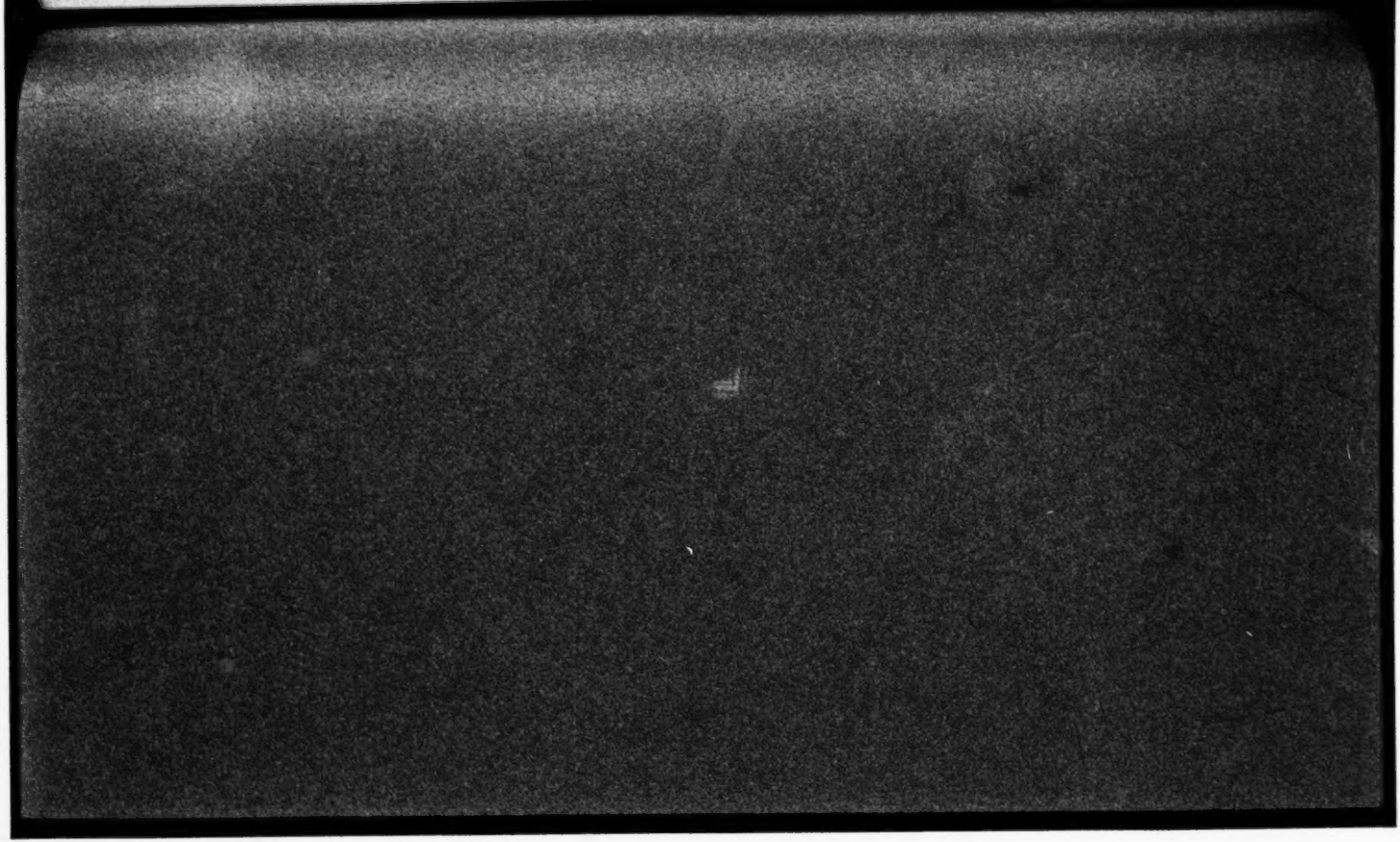
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February 19, 1974

[redacted]



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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1377

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CONTINENTAL AIR LINES, INC.; THE CITY OF EL PASO, THE EL PASO AIRPORT BOARD & THE EL PASO CHAMBER OF COMMERCE; TUCSON AIRPORT AUTHORITY; THE CITY OF PHOENIX, ARIZONA AND THE PHOENIX CHAMBER OF COMMERCE; THE CITIES OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; THE CITIES AND CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA, TEXAS; THE CITY OF SAN ANTONIO & THE GREATER SAN ANTONIO CHAMBER OF COMMERCE; NATIONAL AIRLINES, INC., INTERVENORS

No. 73-1387

BRANIFF AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CONTINENTAL AIR LINES, INC.; THE CITY OF EL PASO, THE EL PASO AIRPORT BOARD & EL PASO CHAMBER OF

COMMERCE; TUCSON AIRPORT AUTHORITY; THE CITY OF PHOENIX, ARIZONA AND THE PHOENIX CHAMBER OF COMMERCE; THE CITIES OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; THE CITIES & CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA, TEXAS; CITY OF SAN ANTONIO & THE GREATER SAN ANTONIO CHAMBER OF COMMERCE; NATIONAL AIRLINES, INC., INTERVENORS

No. 73-1391

TEXAS INTERNATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

THE CITY OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; THE CITY OF EL PASO, THE EL PASO AIRPORT BOARD AND THE EL PASO CHAMBER OF COMMERCE; CONTINENTAL AIR LINES, INC.; THE CITY OF SAN ANTONIO AND THE GREATER SAN ANTONIO CHAMBER OF COMMERCE; NATIONAL AIRLINES, INC.; MIDLAND AND ODESSA, TEXAS COMMERCE, INTERVENORS

No. 73-1414

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CONTINENTAL AIR LINES, INC.; CITY OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; CITY OF

EL PASO, EL PASO AIRPORT BOARD AND THE EL PASO CHAMBER OF COMMERCE; THE CITIES AND CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA, TEXAS, INTERVENORS

No. 73-1449

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CONTINENTAL AIR LINES, INC.; THE CITY OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; CITY OF EL PASO, EL PASO AIRPORT BOARD, ET AL.; THE CITIES AND CHAMBER OF COMMERCE OF MIDLAND AND ODESSA, TEXAS, INTERVENORS

No. 73-1498

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CITY OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; CONTINENTAL AIR LINES, INC.; EL PASO CIVIC INTEREST; THE CITIES AND CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA, TEXAS, INTERVENORS

Petitions for Review of Orders of the Civil Aeronautics Board

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Decided October 23, 1973

Robert Reed Gray, with whom *James W. Callison* and [*Louis*] *Hayner Kurrelmeyer*, were on the brief, for petitioner, No. 73-1377, Delta Air Lines, Inc. *Nathaniel P. Breed, Jr.*, also entered an appearance for petitioners, No. 73-1377, Delta Air Lines, Inc.

Andrew T. A. MacDonald, for petitioner in No. 73-1449, National Airlines, Inc., and Intervenor in No. 73-1377, 73-1387, and 73-1391.

James M. Verner, with whom *John L. Richardson* and *Stuart F. Pierson*, were on the brief, for petitioner in No. 73-1391, Texas International Airlines.

Ray Nerenberg, with whom *Robert N. Duggan*, for petitioner in No. 73-1414, Eastern Air Lines, Inc.

B. Howell Hill, Jr., with whom *Patrick F. J. Macrory* and *Stephen M. Sacks*, were on the brief, for petitioner in No. 73-1387, Braniff Airways, Inc.

Ky P. Ewing, with whom *Alfred V. J. Prather* was on the brief, for petitioner in No. 73-1498, American Airlines, Inc.

O. D. Ozment, Deputy General Counsel, Civil Aeronautics Board, with whom *Richard Littell*, General Counsel, *Robert L. Toomey*, Attorney, Civil Aeronautics Board and *Howard E. Shapiro*, Attorney, Department of Justice, were on the brief, for respondent. *R. Tenney Johnson* and *Warren L. Sharfman*, Attorneys, Civil Aeronautics Board, also entered appearances for respondent.

Thomas D. Finey, Jr., with whom Lee M. Hydeman, was on the brief, for Intervenor, Continental Air Lines, Inc.

Herman F. Scheurer, Jr., and *John J. McLaughlin* were on the brief, for intervenor, El Paso Civil Interests.

Albert F. Grisard, for Intervenors The City of Phoenix, Arizona, The Phoenix Chamber of Commerce and The Tucson (Arizona) Airport Authority in No. 73-1377.

Robert M. Bechman, for intervenor, The Cities and Chambers of Commerce of Midland and Odessa, Texas.

Cecil A. Beasley, Jr., and *John C. Smuck*, were on the brief, for Intervenor, City of Houston, Texas and Houston Chamber of Commerce.

Albert F. Beitel and *Roger C. Ohlrich*, were on the brief, for intervenor, City of San Antonio and Greater San Antonio Chamber of Commerce, in Nos. 73-1377, 73-1387 and 73-1391.

Before BAZELON, *Chief Judge*, LEVENTHAL and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge:* Petitioners, six air carriers, seek review of the Civil Aeronautics Board's decision in the *Southern Tier Competitive Non-Stop Investigation (Houston-Miami Phase)* by which the Board determined that there was a need for nonstop service in competition with National Airlines between Miami and Houston, and selected Continental Air Lines to provide such service.[1]

I.

Petitioners raise various arguments attacking the propriety of the Board's rulings. We have found little merit in these arguments, and accordingly do not pause to consider them in any detail. We find, for example, that the decision of the Administrative Law Judge as adopted by the Board to the effect that there is a sufficiently large market to sustain a competitive challenge to National Airline's monopoly of the Miami-Houston route to be supported by substantial evidence. Similarly, we discern no

[1] Orders 73-2-89 (S.J.A. 560); Order 73-5-22 (S.J.A. 702); Order 73-5-110 (S.J.A. 685).

procedural defect nor deviation from prior decisional norms in the Board's selection of Continental. That selection was made primarily on the grounds that Continental, the only applicant that proposed substantial fare reductions, a feature found attractive by the Board, offered a more attractive pattern of Houston-Miami nonstop frequencies than any of the other applicants, in that it proposed more (4) and better spaced round trips per day. The Board noted that Continental's ability to offer these advantages in the Houston-Miami market was ascribable in good measure to its volume of traffic coming into Houston from points west—*e.g.*, Phoenix, Albuquerque, San Antonio and El Paso. The Board also took into account that Continental offered the extra dividend of more beyond area benefits than those offered by any of the other applicants, in providing new one-carrier service to Miami (via the Houston stop) from Phoenix, Albuquerque and El Paso, and competition for such one-carrier service in the case of San Antonio.

Finally, the Board found that any disadvantages to the Continental application were minimal and easily limited. Without going into detail on these matters, we hold that the Board's findings were supported by substantial evidence, and that there has been no substantial showing of unexplained departure from standard decisional doctrine or discriminatory and divergent treatment of the various applicants.

II.

We turn to the challenge presented by Delta Air Lines in reliance on its claim under the *Ashbacker* doctrine.[2]

With Delta challenging Continental, their positions stand reversed from those occupied when, in 1971, Continental secured a ruling from this court setting aside the Board's 1969 decision concluding that the public con-

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[2] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

venience and necessity required competitive nonstop service in the Houston-Miami market and awarding the route to Delta. *Continental Air Lines, Inc. v. CAB*, 143 U.S.App.D.C. 330, 443 F.2d 745 (1971).

Delta's *Ashbacker* argument derives from the fact that Continental will be able to combine, or "tack," its new Miami-Houston award with its existing Houston-west route system, so as to operate through flights (via at least one intermediate stop at Houston) between Miami and Albuquerque, El Paso, Phoenix, or San Antonio. According to Delta, Continental's entry into these markets will preclude Delta from receiving awards which it desires for new authority involving the Albuquerque, El Paso, Phoenix, San Antonio markets.

Delta insists that its complaint requires review of the background of CAB's treatment of airline service in the southern portion of the United States. This could go all the way back to the days when single plane service between California and Florida was achieved only by "interchange" flights along the routes of several carriers. For present purposes, we can begin our historical approach with the investigation begun by the CAB in 1961 of service then being provided to more than 22 cities lying in and between Florida and California. *Southern Trans-Continental Service Case*, 33 CAB 701 (1961). The Board's awards of transcontinental routes to Delta (Atlanta to Los Angeles/San Francisco) and to National Airlines (Miami to Los Angeles) contemplated full freedom for intermediate stops and protection from competition on these routes. By 1967, the Board concluded that changed conditions called for competition on the established routes, toward the objective of better service between the principal city-pairs in the South. Instead of

another general area-wide study the Board decided to focus on service in 18 primary markets.[3]

"To keep the investigation within manageable bounds" the Board decided to limit the scope of the case to those designated markets "rather than institute an area type proceeding." Order E-24847 (March 30, 1967). To further this aim, it imposed a pre-trial restriction under which any new award would be in the form of a separate segment instead of an addition to an existing segment. (*Id.* at 3.)

Delta and several other carriers objected to the scope of the case as structured by the Board and sought to expand it into a much broader proceeding. Delta, in particular, requested, *inter alia*, the consolidation of applications for (1) a new route from San Francisco and Los Angeles to Miami via numerous intermediate points, including Phoenix, Albuquerque, El Paso, Dallas, Huntsville, Atlanta, and Tampa, and (2) a second new segment between the same west coast points and Miami via a somewhat different set of intermediate cities, including

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[3] The 18 markets directly at issue in *Southern Tier* were:

Atlanta-Dallas/Fort Worth
-Los Angeles/Long Beach
-San Francisco/Oakland

Dallas/Fort Worth-Los Angeles/Long Beach
-New Orleans
-San Francisco/Oakland
-Tampa/St. Petersburg/Clearwater

Houston-Los Angeles/Long Beach
-San Francisco/Oakland

Miami/Fort Lauderdale-New Orleans
-Dallas/Fort Worth
-San Francisco/Oakland
-Los Angeles/Long Beach
-Houston
-Tampa/St. Petersburg/Clearwater

New Orleans-San Francisco/Oakland
-Tampa/St. Petersburg/Clearwater

Phoenix, El Paso, Albuquerque, Dallas, San Antonio, Houston, New Orleans and Tampa.

By Order E-25720 (Sept. 21, 1967), the Board rejected all attempts to broaden *Southern Tier*. It found that any such expansion "would start a chain reaction" transforming the proceeding into a massive area investigation encompassing a review of the needs of hundreds of markets in the southern tier states. (*Id.* at 2, S.J.A. 11). The Board therefore refused to consolidate Delta's applications except to the extent they conformed to the existing scope of the case. It also rejected Delta's related claim that, under *Ashbacker*, a refusal to consolidate its applications would require the Board to impose single-plane restrictions on the operations of other applicants.

> If these contentions were true there would be no geographical limit to a proceeding. We do not find these or the extensive pretrial restrictions proposed by Delta to be necessary or desirable for imposition prior to hearing. Neither can we enlarge the proceeding's scope because certain carriers may have more beyond-area traffic advantages than others with respect to some segments to be considered. Differing route patterns afford carriers varying advantages in the service they can offer in any proceeding and it would be impractical to attempt to fashion one in which all were equal. (Order E-25720, p. 3 (S.J.A. 12).)

However, the Board noted that the parties remained free to urge the need for more stringent restrictions during the hearing and expressly invited them to submit evidence to prove mutual exclusivity. (*Ibid.*)

Delta (along with National) then moved for judicial review of the Board's instituting orders. It argued that the Board had violated *Ashbacker* by including the issues of transcontinental authority on a nonstop basis or via one-stop at certain southern tier cities (New Orleans, Houston, Dallas), while excluding applications for one-

stop transcontinental routes via other southern tier points (including Phoenix, Albuquerque, San Antonio and Huntsville).

In *National Airlines* v. *CAB*, 129 U.S.App.D.C. 180, 392 F.2d 504 (1968), this court dismissed Delta's petition, finding that the Board was not required as a matter of law to consolidate the carrier's excluded applications. We took cognizance of the Board's standard practice of permitting parties to make a factual showing of economic mutual exclusivity between such excluded applications and the route issues within a proceeding.

Our 1968 *National Airlines* decision is of significance because in a context almost identical to that presented here[4] this court there made clear that the *Ashbacker* rule is basically a rule of fairness in comparative consideration, that it must be applied with common sense and in a practical fashion, that it cannot be applied in the same way to complex air route questions as to tele-communications proceedings, and that *Ashbacker* cannot be applied so as to impair or eradicate the considerable measure of discretion that the Board must retain in defining the scope of air route cases.

It bears reiteration that the Board is not obliged to structure its proceedings so as to equalize the beyond market capabilities of all applicants to a route case. As this court observed in *National Airlines v. CAB*:

> Preexisting route intricacies render it almost impossible for the Board to tailor its proceedings so as to equalize the advantages, and disadvantages, with which each applicant enters a comparative proceeding. The maturing and sophisticated route structure and development preclude a simplistic vindication of Ashbacker claims.

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[4] Even though Delta's *Ashbacker* claim was dismissed as premature rather than conclusively rejected.

392 F.2d at 508, 129 U.S.App.D.C. at 184.

The rejection in the *National Airlines* case of any simplistic presentation of *Ashbacker* claims has full vitality for that aspect of the opinion that upheld the Board's approach in refusing to transform Southern Tier into a massive area investigation. This court said:

> Petitioners claim that the exclusion of San Antonio, Tucson and El Paso from any of the scheduled proceedings deprives them of *Ashbacker* rights because petitioners have applied for transcontinental routes with intermediate stops at these excluded cities. American Airlines, for example, presently serves these excluded cities on routes extending from Houston and Dallas to the West Coast. By acquiring Miami-Houston and Dallas authority in Southern Tier, American would have a transcontinental route that would, say petitioners, economically exclude the applications petitioners have filed for similar authority.
>
> We think this situation is analogous to that in Eastern Airlines, Inc. v. Civil Aeronautics Board. There Northwest applied for Detroit-Miami rights which Eastern already had, and the Board scheduled this service for investigation. Eastern sought expansion of this hearing to include its application for Detroit-West Coast rights already held by Northwest. Eastern contended that this was required by *Ashbacker* since a grant to Northwest would *de facto* give it West Coast-Detroit-Miami rights, and that if Eastern were not then given an opportunity to attain the same transcontinental route by completing its missing segment, it could not as an economic matter justify a second carrier on that route. We held that Eastern could not, in the name of *Ashbacker*, extend a geographically limited investigation "into a massive consideration of the whole of American air transportation." (Footnotes omitted.)

129 U.S.App.D.C. at 186, 392 F.2d at 508.

The thrust of Delta's present *Ashbacker* claim to this court is that the CAB has denied Delta a right to a fair hearing because it has refused to hear Delta's application for authority to serve an area, has avowedly structured the proceedings so as to avoid area considerations, and has nevertheless granted the route in issue to Continental on the basis of the service it can render to the same area. Delta says that the decision before us for review violates this principle because the Board has selected Continental because of beyond-area benefits to the "excluded points."

It would serve no useful purpose for this decision to become entangled in all of the details of Delta's objections, and what the Board counsel identifies as its change in the service it really proffers so far as the excluded points are concerned. It suffices to say that the Board decision does not rest in dominant degree upon the beyond-area benefits to the "excluded points." They were taken into account as a modest aspect of the entire case. The Board, however, remained focused on service between Houston and Miami and did not, fairly speaking, convert this into an area case which turned on determination of the service to and from excluded points, or any determination of the need for such service or the carrier best qualified to give such service.

It is true that the Board did give consideration to traffic generated at the excluded points when it came to measure the quantity of traffic between Houston and Miami—for the purpose of appraising the feasibility and realism in Continental's proffer as to Houston-Miami service, and of appraising the quantity and quality of the Houston-Miami service proposed by Continental. But the focus was on the Houston-Miami segment, even though the CAB traditionally views proposals for any particular segment not with tunnel vision but rather with a pe-

ripheral vision that takes into account the support (or diversion) ascribable to nearby service.

In sum, Delta's *Ashbacker* claim rests on the fallacy that Continental was selected for its ability to serve the needs of the excluded cities whereas it was actually selected upon evaluation of the Houston-Miami market, its need for service, and the kind of service in that market proffered by Continental, including the service made possible by Continental's backup support—for well spaced round trips daily at fare reductions, and all of the other items discussed above.

Delta was given the opportunity to make a showing of mutual exclusivity that *Ashbacker* contemplates. But that did not require putting its applications on an equal par with the backup service in fact available from Continental's existing traffic. As already noted, pre-existing certificates do give an advantage to certain applicants for a new segment, but that is not inherently unfair. Nor can we open the door to an equalization approach that would encourage all kinds of defensive route applications. The Board must act realistically in terms of existing route identification and business patterns.

The four members of the Board were in agreement in denying the *Ashbacker* claim in Delta's petition for reconsideration, and we are in agreement in rejecting its petition for review.

III.

A.

Various parties claim that route restrictions should have been imposed upon Continental to protect the losing applicants against excessive diversion of traffic. They claim inconsistency between the Board's decision not to impose restrictions (Order 73-2-89 p. 11-12 (S.J.A. 571-72); (Order 73-5-22 p. 13 (S.J.A. 714) in order to pro-

tect competitors from excessive diversion and its qualification of the award to Continental by a two-stop requirement of any transcontinental route by the carrier along the southern tier (Order 73-2-89 p. 4 (S.J.A. 564). We discern no inconsistency. The purpose of the two-stop limitation upon Continental is to "preserve for the Board maximum decisional flexibility" in awarding a new transcontinental route, already in the hearing process, by assuring that Continental did not become a substantial participant in Miami-Los Angeles traffic. *Id.* In no way did the Board intimate that these restrictions were being used to protect certain of the applicants from diversion. In fact, the Board found that the award of the Miami-Houston route to Continental would involve only minimal diversion. (Order 73-2-89 pp. 11-12 (S.J.A. 571-72).

Upon reconsideration, requests for operating restrictions were pressed more forcefully. Petitioners here assert that settled practice entitles carriers to defer their arguments on route operating restrictions until the Board has made its award to one of the competing applicants. We see no valid foundation to such a claim of entitlement. Typically, all parties are aware of what routes are being sought and by whom. They can argue, possibly in the alternative, that if such routes are granted operating restrictions will be necessary to prevent undue diversion. Indeed, it would seem appropriate that the Board should have before it the argument as to amount of restriction that would be required as to any particular carrier so that it could consider whether to assume that burden in making such an award.

B.

Finally, we endeavor to put to rest two erroneous theories of proper Board procedure. American Airlines protests the failure of the Board to give reasons why it

did not award the route on the basis of a "net-benefit" formula propounded by American. No such burden can be put on an agency. Reasoned decision making demands that an agency articulate the standards upon which it bases it awards. The Board did so hereby expressly adopting the Administrative Law Judge's Initial Decision, which contained an explanation of the ten carrier selection factors. (Order 73-2-89 p. 1 (S.J.A. 561); (Initial Decision of Examiner Wm. H. Dapper pp. 20-21 (S.J.A. 498-99). The agency had sufficiently indicated its general approach in terms of the factors that were taken into account. This necessarily entailed judgment on the part of the CAB in its heft of the various factors in any particular case. It was not required—indeed, it may well have been unable—to produce a quantifying formula as the definition of its approach. It may be said, indeed, that American's formula, oversimplified, is merely that the less service is offered, the less diversion will result. The Board, however, although required to consider diversion, was entitled to go beyond the applicant that caused the least diversion and select the carrier that proffered the most service to the public.

National Airlines asserts that it was entitled to a determination of its petition for reconsideration by a majority of the Board, and that delay until a five-man board came into being was consequently required when the Board split 2-2 on its petition for rehearing. We find no merit in this point. In *Braniff Airways v. CAB*, 126 U.S.App.D.C. 399, 379 F.2d 453 (1967), we found a Board duty to consider a matter upon rehearing where the application for reconsideration identified a fundamental defect in the Board's order as originally entered. For reasons already set forth, that is not the condition that confronts us here. Where the Board's order is without such a gross defect, its initial decision is ordinarily to be taken as its authoritative action. The

Board has the legal authority to decide upon reconsideration whether to adhere to its initial conclusion or to amend or reverse it; but a party has no right to reconsideration by more than quorum of the Board. Where that quorum refuses to take action to overturn an order valid when originally entered, the administrative process is terminated.

The petitions to review are denied, and the Board's order stands affirmed.

So ordered

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

No. 73-1377, 73-1387,
73-1391, 73-1414,
73-1449, 73-1498

[Filed Nov. 20, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

DELTA AIR LINES, INC., ET AL. PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CONTINENTAL AIR LINES, INC., THE CITY OF EL PASO, THE EL PASO AIRPORT BOARD & THE EL PASO CHAMBER OF COMMERCE, TUCSON AIRPORT AUTHORITY, THE CITY OF PHOENIX, ARIZONA AND THE PHOENIX CHAMBER OF COMMERCE, THE CITIES OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE, THE CITIES AND CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA TEXAS, THE CITY OF SAN ANTONIO & THE GREATER SAN ANTONIO CHAMBER OF COMMERCE, NATIONAL AIRLINES, INC., INTERVENORS

Before: BAZELON, *Chief Judge*, LEVENTHAL and ROBINSON, *Circuit Judges.*

ORDER

It is ORDERED by the Court *sua sponte* that the opinion of October 23, 1973 in the above entitled cases is amended as follows:

Page 12, second paragraph, omit the following:

"They were taken into account as a modest aspect of the entire case. The Board, however, remained focused . . ."

Substitute the following:

"That is to say, this is not a case where Continental had no advantage over the competing carriers in terms of Houston-Miami service, and was awarded the route because of the beyond-area benefits. The Board was primarily focused . . ."

Per Curiam

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 73-1377

[Filed Oct. 23, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CONTINENTAL AIR LINES, INC.; THE CITY OF EL PASO, THE EL PASO AIRPORT BOARD & THE EL PASO CHAMBER OF COMMERCE; TUCSON AIRPORT AUTHORITY; THE CITY OF PHOENIX, ARIZONA AND THE PHOENIX CHAMBER OF COMMERCE; THE CITIES OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; THE CITIES AND CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA TEXAS; THE CITY OF SAN ANTONIO & THE GREATER SAN ANTONIO CHAMBER OF COMMERCE; NATIONAL AIRLINES, INC., INTERVENORS

No. 73-1387

BRANIFF AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CONTINENTAL AIR LINES, INC.; THE CITY OF EL PASO, THE EL PASO AIRPORT BOARD & EL PASO CHAMBER OF COMMERCE; TUCSON AIRPORT AUTHORITY; THE CITY OF PHOENIX, ARIZONA AND THE PHOENIX CHAMBER OF COMMERCE; THE CITIES OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; THE CITIES & CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA, TEXAS; CITY OF SAN ANTONIO & THE GREATER SAN ANTONIO CHAMBER OF COMMERCE; NATIONAL AIRLINES, INC., INTERVENORS

No. 73-1391

TEXAS INTERNATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

THE CITY OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; THE CITY OF EL PASO, THE EL PASO AIRPORT BOARD AND THE EL PASO CHAMBER OF COMMERCE; CONTINENTAL AIR LINES, INC.; THE CITY OF SAN ANTONIO AND THE GREATER SAN ANTONIO CHAMBER OF COMMERCE; NATIONAL AIRLINES, INC.; MIDLAND AND ODESSA, TEXAS COMMERCE, INTERVENORS

No. 73-1414

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CONTINENTAL AIR LINES, INC.; CITY OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; CITY OF EL PASO, EL PASO AIRPORT BOARD AND THE EL PASO CHAMBER OF COMMERCE; THE CITIES AND CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA, TEXAS, INTERVENORS

No. 73-1449

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CONTINENTAL AIR LINES, INC.; THE CITY OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; CITY OF EL PASO, EL PASO AIRPORT BOARD, ET AL.; THE CITIES AND CHAMBER OF COMMERCE OF MIDLAND AND ODESSA, TEXAS, INTERVENORS

No. 73-1498

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CITY OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; CONTINENTAL AIR LINES, INC.; EL PASO CIVIL INTEREST; THE CITIES AND CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA, TEXAS, INTERVENORS

PETITIONS FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

Before: BAZELON, *Chief Judge*, LEVENTHAL and ROBINSON, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on Petitions for Review of an Order of the Civil Aeronautics Board and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the petitions to review are denied and the Board's order is affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: October 23, 1973

Opinion for the Court filed by Circuit Judge Leventhal.

APPENDIX C

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

DOCKET 18257

SOUTHERN TIER COMPETITIVE NONSTOP INVESTIGATION
(Houston-Miami Phase)

Decided: February 23, 1973

Continental Air Lines' certificate for route 29 amended by adding a new segment between the terminal point Houston, Tex., and the terminal point Miami-Fort Lauderdale, Fla., subject to conditions.

Applications of American Airlines, Braniff Airways, Delta Air Lines, Eastern Air Lines, and Texas International Airlines denied, and investigation terminated.

APPEARANCES:

Same as in the administrative law judge's initial decision and, in addition, the following:

Roy Nerenberg for Eastern Air Lines.

James F. Bell for Pan American World Airways.

Charles W. Pope for the City and Chamber of Commerce of San Antonio, Tex.

F. W. Dunlevy, Jr., for the City and Chamber of Commerce of Oklahoma City, Okla.

Roger C. Ohlrich for the City and Chamber of Commerce of Albuquerque.

OPINION

BY THE BOARD:

This proceeding involves a determination of the need for competitive nonstop service in the Houston-Miami market and, if required, which carrier should be selected to provide the service. This phase of the *Southern Tier* investigation was remanded to the Board by mandate of the United States Court of Appeals for the District of Columbia Circuit. *Continental Air Lines, Inc. v. CAB*, 443 F.2d 745 (D.C. Cir. 1971).

In an initial decision, attached as an appendix, Administrative Law Judge William H. Dapper concluded that there is a need for competitive nonstop service and that Continental Air Lines should be selected to provide the service. The Board exercised its right of discretionary review, briefs to the Board have been filed, and oral argument has been heard.[1] Upon consideration of the matters presented, we have decided to affirm Judge Dapper's disposition of the issues with one modification. We shall impose a two-stop restriction on flights

[1] Briefs to the Board were filed by Braniff, Continental, Delta, Eastern, National, Texas International, and the City of San Antonio and the Greater San Antonio Chamber of Commerce. American Airlines; the City of Albuquerque, *et al.*; the City Airport Board and Chamber of Commerce of El Paso; the City and Chamber of Commerce of Houston; the City, Board of City Development and Chamber of Commerce of Lubbock; the Greater Miami Traffic Association; Midland/Odessa Cities and Chambers of Commerce; the City and Chamber of Commerce of Phoenix; and the Tucson Airport Authority adopted their briefs to the administrative law judge as their briefs to the Board. Pan American and Western Air Lines filed briefs on the sole issue of the need for a restriction against one-stop Los Angeles-Miami service.

operated between Los Angeles and Miami. Accordingly, except to the extent modified herein, we adopt his findings and conclusions as our own.

Need for Nonstop Competition

We agree with Judge Dapper's conclusion that the Houston-Miami/Ft. Lauderdale market has an affirmative need for competitive nonstop service.

Traffic over this 960-mile segment, which totalled about 120,000 true O&D and interline connecting passengers in 1971 (or nearly 330 per day), is presently served by National, the only certificated incumbent, and by Delta, under a *pendente lite* exemption. (As we have repeatedly indicated, however, no weight will be given Delta's exempted operations as a factor favoring its selection for certificated authority here. See Order 71-3-34, March 5, 1971)

In our view, the record clearly establishes a need for competition to meet the present and potential needs of Houston-Miami passengers, and to assure the continued growth and development of the market. The record also shows that the Houston-Miami market is sufficiently large and strong to support competition—a finding that even National does not seriously dispute.

In 1969, when the Board initially considered the issue, it found the basic deficiency in National's Houston-Miami services to be the carrier's failure to develop the market aggressively and, in particular, to provide a sufficient level of nonstop frequencies. At that time, National provided only a single daily westbound nonstop flight for Miami-Houston passengers. With Delta in the market, National has increased its nonstop operations slightly to one daily round trip, but has continued to concentrate on flights making one or more intermediate stops between Miami and Houston. Despite this fact, the mar-

ket has demontrated its responsiveness to nonstop competition by expanding significantly between 1969 and 1971, in the face of a general lag in traffic growth throughout the country. Judge Dapper estimated that with continued competition Houston-Miami would generate more than 150,000 passengers (well over 400 per day) in 1973, the forecast year.

National asserts that, as a monopoly carrier, it would schedule only two daily Houston-Miami nonstop round trips, one fewer than the market now receives. We consider this an unimpressive level of nonstop frequencies for a long-haul market of Houston-Miami's size. Moreover, apart from any specific service pattern National would offer in the immediate future as a monopoly carrier, we have serious doubts about whether the incumbent can be expected to respond effectively to the long-range demands of Houston-Miami traffic. Our concern is grounded on the fact that in the absence of competition, National has a far greater incentive to route Houston-Miami passengers over New Orleans, thereby lending important beyond support to its services in the larger and highly competitive Houston-New Orleans and New Orleans-Miami markets. (The latter generated 287,000 and 129,000 O&D and connecting passengers, respectively, in 1971). Under the circumstances, we find that the public convenience and necessity require competitive nonstop service to afford Houston-Miami passengers a complete, well balanced pattern of nonstop schedules and to safeguard the continued growth of the market.

In this connection, we are not persuaded by National's contentions that the special characteristics of the Houston-Miami market, with its substantial component of tourist traffic, make frequent nonstop flights evenly spaced throughout the day unnecessary. For example, National claims that morning departures from Miami—which elsewhere would be considered prime-time—are unpopular,

and cites as evidence low load factors experienced on National's and Delta's morning nonstops between Miami and Houston. However, the probative value of this experience is undermined by the fact that the two carriers' morning nonstops were closely bunched—*i.e.* scheduled from 15 to 40 minutes apart. As a result, the low load factors on these flights do not, standing alone, demonstrate that morning departures at Miami are unattractive. Indeed, an examination of current schedules shows a substantial number of such morning departures in numerous markets, some not notably different from the one at issue in any relevant way (*e.g.*, Miami-Dallas, Miami-New Orleans) In short, the record does not support the thesis that Houston-Miami's needs for nonstop competition should be minimized or assessed differently from the service needs of similar markets.

Carrier Selection

Having found a need for competitive nonstop service between Houston and Miami, we affirm Judge Dapper's selection of Continental to provide this service. However, we will modify his determination in one respect, by imposing a two-stop restriction on Continental's authority between Miami and Los Angeles. While we do not suggest that such a restriction is mandated by the *Ashbacker* doctrine, we have decided to adopt it on policy grounds. Specifically, we believe that a two-stop limitation will effectively assure that Continental does not become a substantial participant in Miami-Los Angeles traffic and will thus preserve for the Board maximum decisional flexibility in the *Miami-Los Angeles Competitive Nonstop Case*, now in the hearing process. Moreover, Continental has not proposed one-stop Miami-Los Angeles service and should therefore not be hampered by our restriction.

Our choice of Continental for a Houston-Miami award is predicated primarily on the fact that it will bring greater service benefits than any other applicant to the primary market and offer superior beyond-area advantages as well. At the same time, we believe that Continental's proposal will not seriously harm any other carrier.

When the Board in the original phase of the case selected Delta rather than Continental for a Houston-Miami award it did so largely on the basis of broad considerations of the overall balance and health of the air transportation industry as a whole. It thus expressed concern, on the one hand, that (1) Delta, as one of the two carriers with an existing southern transcontinental route system, faced far more diversion than did Continental in the *Southern Tier* and other cases, and, on the other, that (2) Continental had received substantial new route authority, sufficient for it "to digest at one time." Order 69-7-135, at p. 45.

The experience of the intervening 3½ years since the Board's earlier decision leads us to place less emphasis on such industry balance factors in selecting a Houston-Miami competitive carrier. First, the balanced complex of route awards made in the original *Southern Tier* proceeding has in any case been altered by the fact that an award of the major Miami-Los Angeles route, initially granted to Northeast, is once more under consideration and could conceivably be made to one of the applicants here (all of which, except TXI, are also applicants for Miami-Los Angeles authority). Next, notwithstanding the diversionary impact of the Board's 1969 awards, Delta has retained its position as one of the industry's most profitable airlines, and has recently obtained major new route opportunities through its merger with Northeast.

Similarly, industry balance or carrier strengthening considerations can be said to favor only two of the four remaining applicants—Texas International and, to a lesser extent, Braniff—over Continental.[1] For reasons detailed below, however, we believe that an award to Texas International would be inappropriate. In the case of Braniff, a financially sound and profitable trunkline, we cannot agree that the somewhat smaller size of its route system under most indicia should be accorded more weight than Continental's advantage in public benefits.

Also, Continental has had ample time to digest its earlier route awards and, by and large, has done so successfully. Several parties, however, point to the one exception, the Dallas-Los Angeles market, awarded to Continental in the original phase of this case. While the carrier promptly instituted operations in this market, it was forced to withdraw its services about two years later. We agree with Judge Dapper that Continental's Dallas-Los Angeles experience does not indicate the airline would find it difficult to absorb a Houston-Miami route, or that it would be less than an effective competitor in the market. Indeed, Continental's problem in the Dallas-Los Angeles market was not essentially attributable to absorption difficulties (it had strong identity at both terminals), but to the fact that it was certificated during a traffic recession period against *two* incumbents, each with substantial beyond support that Continental lacked. By contrast, the carrier has significant back-up traffic support for its Houston-Miami proposal, faces only a single competitor, and would inaugurate its services in a market which has shown steady growth through the recent nationwide traffic lag.

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[1] The remaining applicants, American and Eastern, two of the industry's Big Four, are considerably larger than Continental.

For all these reasons, our choice of a Houston-Miami competitor, like Judge Dapper's, turns on the traditional carrier selection factors directly applicable to the market at issue rather than on wider industry balance considerations.

Proceeding on that basis, we find first that none of the applicants has a significant advantage in terms of historic stake in the Houston-Miami market, since none has participated in as much as 3 percent of its traffic. (Delta's exempted operations cannot, of course, be considered in this regard.) Accordingly, we now turn to an examination of the applicants' competing service proposals, which are described in detail in the initial decision, pp. 12-16.

At the outset, we are prepared to assume for the purposes of this opinion that all applicants, other than Texas International, can be expected with reasonable assurance to operate their proposals at a profit.[2] The relative profitability of their various operations is therefore not nearly as important a decisional factor as the public benefits they can provide.

As we have observed, Continental can offer a more extensive pattern of Houston-Miami nonstop frequencies—four daily round trips—than any other carrier. It can support this level of service because of its substantial pool of support traffic west of Houston. As a corollary, Continental would also provide greater beyond benefits than any other applicant, bringing first single-plane service to approximately 37,000 passengers in the Miami-Phoenix/Tucson/Midland/El Paso markets, and competitive one-stop flights to about 25,000 Miami-San Antonio passengers in 1973.[3] While we accord less weight to com-

[2] However, we find Judge Dapper's adjustments to these carriers' various forecasts to be reasonable.

[3] These are Judge Dapper's estimates. Continental forecasts a somewhat lower total of first single-plane passengers—30,000. Either

petitive than to first single-plane service, Continental's Miami-San Antonio flights represent a substantial public interest factor in this market, where more than 30 percent of the traffic moves on interline connecting flights. Finally, Continental would provide first single-carrier service to nearly 4,700 beyond passengers and additional on-line connections to numerous others.

Several parties, particularly Delta, argue that while Continental proposes the greatest quantity of Houston-Miami service, the primary market's needs can be better met by a carrier operating a more limited pattern of turn-around nonstop frequencies tailored to the travel demands of local passengers. While the turn-around services proposed by Delta and Eastern may well represent valuable public benefits, we find them outweighed, on balance and under the factual circumstances before us, by Continental's ability to offer more Houston-Miami nonstop frequencies and substantially superior beyond benefits. We note in this regard that the principal deficiency in National's Houston-Miami service has been its failure to provide a full, balanced pattern of nonstop flights because of a greater incentive to move Houston-Miami traffic over intermediate points;[4] however, the market has not seriously suffered other shortcomings, notably high load factors, which often occur when a smaller market is served as part of a long-haul route. We are confident that Continental can correct this existing deficiency by providing for Houston-Miami passengers the frequent, well-timed nonstops it has in fact proposed. Moreover, considering the substantial size and length of the Houston-Miami route, we find no support for specula-

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forecast supports our finding that Continental would offer the most beyond benefits. In this connection, we reject Delta's claim that several of Continental's proposed flights would violate certain conditions in the latter's certificate. See I.D. pp. 58-61. Delta's Ashbacker argument is discussed below, pp. 12-15.

[4] See p. 1, supra.

tion that Continental would subordinate its needs to those of other markets.

Finally, an evaluation of Texas International's application involves certain additional considerations. The local service airline's proposal is second only to Continental's in overall primary market and beyond-segment benefits. In view of its obviously greater need for strengthening, TXI might thus at first glance seem a reasonable choice for an award here. On the whole, however, its selection at this time involves unacceptable financial risks for the carrier and, in turn, brings into question its ultimate ability to meet Houston-Miami's needs for effective competition. Specifically, while TXI has forecast an operating profit of about $1 million for its proposal (about $25,000 short of a full return on investment after taxes), its estimate that it would capture nearly 40 percent of Houston-Miami traffic in competition with a strong trunkline incumbent seems unduly optimistic, as Judge Dapper found. This is especially true since TXI has no identity on the east coast and would have to open an expensive new station at Miami. The unusual expenditure of energy and resources that would be necessary for the carrier to absorb this new route and open the new Miami station are not adequately reflected in its costing approach based on its historic unit expenses. Equally important, we cannot overlook TXI's severe losses in recent years and the fact that it has recently undergone a financial reorganization. In fact, these difficulties were directly responsible for a delay of nearly five months in the carrier's implementation of the Houston-Mexico City authority it received in the *Houston-Monterrey-Mexico City Case*, Order 72-5-61, caused in part by the expense involved in opening a new Mexico City station. Under the circumstances, we do not find this an appropriate occasion to award Texas International a major, long-haul route that would,

at the very least, strain its resources when it has barely begun to absorb its new Mexico City authority.

We appreciate, of course, that Continental, too, has little identity in the East and would—unlike Delta, Braniff or Eastern—be required to open a new Miami station. Continental's position, however, is hardly comparable to TXI's. In the first place, of course, its financial strength and equipment resources are far greater. Furthermore, Continental's forecast (unlike TXI's) has expressly taken into account its preoperating and promotional expenses, totaling $850,000, for the first year of operations (*i.e.*, it has not amortized these expenses over a longer period, an approach which would have substantially increased its profits). For these reasons, and because of its sizeable beyond area back-up traffic support, Continental should be able to overcome its lack of east coast identity without undue difficulty.

Having determined that Continental could offer more significant public service benefits than any other carrier, we find that its advantage in this regard is not vitiated by the diversionary impact of its proposal. In the primary market, we estimate that Continental would divert about 12,000 more passengers from National than would Delta (which proposes only two daily turn-around trips), or about $730,000 in additional gross passenger revenues.[8] Significantly, National would retain more passengers in 1973 than it carried in 1971 in competition with Delta, and about the same number as it attracted in fiscal 1969, its last full year as the *monopoly* incumbent. The only other carrier that could face significant diversion is Eastern, which would lose approximately $1.5 million in

[8] This computation assumes a 56-percent market share for National in competition with Delta (the historic 1971 breakdown) and a 48-percent share in competition with Continental (per I.D. p. 49). It also employs National's yield figures reported in exhibit NA-1R-2.

gross revenues in the Miami-San Antonio market as a result of Continental's introduction of competitive one-stop flights. As Judge Dapper found, use of growth offset methodology would reduce the diversion figure to about $430,000.

For carriers such as National and Eastern, diversion levels of this order are relatively modest, in our judgment, and are outweighed by Continental's superior public service benefits for passengers in the Houston-Miami market and numerous beyond markets, including Miami-San Antonio.

In addition, as Judge Dapper observed, Continental's proposal would not have a significant impact on any other carrier. Certain applicants—TXI and, to a lesser degree, Braniff—have claimed that Continental could *potentially* divert substantial revenues from them if it decided to operate services which it has not in fact proposed. We consider these contentions too speculative to warrant decisive consideration. Moreover, as to Braniff's diversion claim, we believe that even if Continental were to operate single-plane flights between Miami and Denver (a service it has not proposed) its diversionary impact on Braniff would not be so substantial as to affect our decision.[6] It seems clear, however, that Continental's *actual* proposal would not seriously harm either Braniff or Texas International. See I.D. 51-54.

Finally, our colleague in dissent disputes the economics of our competitive award on the basis of certain "load-factor" assumptions. We must, respectfully, differ with his views. Specifically, the dissent's computations include only local and interline connecting passengers in the Houston-Miami market and wholly disregard the extensive pools of on-line support traffic available to Con-

[6] TXI has also claimed substantial diversion in markets where its existing participation is minimal.

tinental west of Houston. In effect, this approach seems to ignore the very factor which has led us to select Continental—namely, the substantial beyond area traffic support that will enable the carrier to provide more Houston-Miami frequencies and greater beyond benefits than any other applicant.

Other Considerations

Lastly, we turn to Delta's contention that *Ashbacker* considerations effectively foreclose Continental's selection for a Houston-Miami award. Specifically, Delta argues that the Board, having refused to consolidate its applications for *nonstop* rights in the Miami-San Antonio/El Paso/Phoenix markets, cannot now permit Continental by tacking to obtain one-stop single-plane authority in the same markets. Conversely, Delta urges that an award to Continental, restricted to prohibit single-plane service in the affected beyond-markets, could not be supported under the Board's carrier selection standards. We are not pursuaded by Delta's contention.

Delta has already presented variations of its *Ashbacker* claim to the United States Court of Appeals for the District of Columbia Circuit. Thus, in *National Airlines v. CAB*, 392 F. 2d 504 (D.C. Cir. 1968), the Court, *inter alia*, rejected the carrier's argument that the Board was required to accord comparative consideration to its Miami-San Antonio/El Paso/Phoenix applications. Delta now claims that while the Board was not required to consolidate its nonstop applications, it cannot now authorize Continental to offer single-plane service in the same markets.[7] We disagree.

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[7] In fact, Delta has also presented this argument to the Court. When Continental appealed our decisions in the original Southern Tier and Dallas-Phoenix cases to the court, Delta defended the Board's determination in part by raising the same Ashbacker grounds it advances here—namely, that Continental's selection in

In the first place, Delta has not established that Continental's single-plane flights between Miami and San Antonio, El Paso and Phoenix and its own application for nonstop rights in each of these markets are mutually exclusive as a matter of law or economic fact. In at least two of these markets, Miami-El Paso and Miami-Phoenix, existing traffic flows (about 5,000 and 14,000 passengers, respectively, in 1971) are so small that the Board is not likely to approve a nonstop award regardless of Continental's presence. In the somewhat larger Miami-San Antonio market, (with 22,000 passengers in 1971) Delta would in any event have to contend with the presence of Eastern, which operates one-stop service and carriers more than 80 percent of the single-carrier traffic. Equally important, in the event the Board decided that the public convenience and necessity required nonstop service in any of these markets, Continental's proposed one-stop, two-stop and three-stop flights would not as an economic matter preclude the more attractive nonstop services that Delta would provide, as Judge Dapper found.

In addition, both the Board and the courts have long recognized that we are not obliged to tailor our proceedings so as to equalize the beyond-area capabilities of all applicants to a route case. While Delta does not dispute this settled doctrine its position here would undermine the principle and thereby endanger the Board's ability to control the scope of its own proceedings. Thus, in any case where one applicant possessed a significant

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the Houston-Miami market on the basis of its beyond services "between the southwest and Miami would be 'inappropriate' because of Ashbacker considerations" (Delta's brief to the Court, p. 42). While the Court did not address Delta's claim in terms, its ruling that the Board had not applied carrier selection criteria consistently in considering the Dallas-Phoenix and Houston-Miami routes at least suggests that it was not impressed with Delta's efforts to distinguish the two markets on Ashbacker grounds.

route integration advantage permitting it to claim substantial beyond benefits, a competing carrier could simply file a defensive application for nonstop rights in the same beyond markets. The Board would then be forced to choose between a massive expansion of the scope of a proceeding, or if it chose not to expand it, to eliminate route integration and beyond benefits as a factor in its decision. The elimination of such back-up support traffic would also reduce the level of service possible in the primary markets at issue. We do not believe that such an interpretation of the *Ashbacker* doctrine is warranted.

Accordingly, in view of the foregoing and all the facts of record, we find that the public convenience and necessity require that Continental's certificate for route 29 be amended by:

1. Adding a new segment to read as follows:

"18. Between the terminal point Houston, Tex., and the terminal point Miami-Fort Lauderdale, Fla."

2. Consolidating existing conditions (9), (10) and (14) and amending the new condition to read as follows: [8]

"(9) The holder shall not schedule single-plane service (a) over segment 6 between Chicago, Ill., on the one hand, and points south of Kansas City, Mo., on the other hand (other than points on segment 6), (b) between Denver, Colo., on the one hand, and Fort Worth or Dallas, Tex., on the other hand, (c) between Los Angeles-Ontario-Long Beach, Calif., on the one hand, and Dallas and Fort Worth, Tex., on the other hand, except over segment 16, or (d) between Portland, Oreg., or Seattle-Tacoma, Wash., on

[8] Our consolidation of the existing single-plane restrictions now contained in conditions (9), (10) and (14) is for administrative purposes only and works no change in substance.

the one hand, and Miami-Fort Lauderdale, Fla., on the other hand."

and renumbering subsequent conditions.

3. Adding a new condition (18) to read as follows:

"(18) Flights between Los Angeles-Ontario-Long Beach, Calif., and Miami-Fort Lauderdale, Fla., shall serve two intermediate points."

We further find:

1. That Continental is a citizen of the United States within the meaning of the Act and is fit, willing, and able properly to perform the transportation herein authorized and to conform to the provisions of the Federal Aviation Act and the rules, regulations, and requirements of the Board thereunder.

2. That for the purpose of determining a license fee in accordance with the schedule set forth in section 389.25 of the Board's regulations, the annual transport revenue increase for Continental is estimated to be greater than $10 million in the first full year of operation.

3. That, except to the extent granted herein, all applications, motions, petitions, and requests involved in this proceeding should be denied, and the investigation should be terminated.

An appropriate order will be entered.

BROWNE, Chairman, MINETTI and MURPHY, Members, concurred in the above opinion. GILLILLAND, Vice Chairman, and TIMM, Member, filed the attached separate dissents.

GILLILLAND, VICE CHAIRMAN, DISSENTING:

The rickety characteristics of the decision have been capably demonstrated by Member Timm and I agree with much that he has said. The great danger in the award, as I see it, lies in the fact that the Board is here creating still another transcontinental carrier. There are already too many and the resulting excessive capacity has neither been conducive to sound economic conditions in the industry, nor considered to be consistent with the public interest.[1] The Board, of course, has here recognized this danger and sought to ameliorate it by imposing a two-stop restriction. This is not sufficient. Although there are prospective beyond benefits of substantial nature they do not restore the scales to balance. I would not make the award.

/s/ Whitney Gillilland

[1] Indeed the Board has recently been constrained to deal with this problem by methods which in earlier years would scarcely have been countenanced. These are the intercarrier agreements related to C.A.B. Orders 71-8-91, 72-6-70, 72-11-6, and 72-11-7.

TIMM, MEMBER, DISSENTING:

The economics of competition in the airline industry have never been a mathematical constant. In 1938 when the Civil Aeronautics Board came into being, carriers were flying aircraft with a seating capacity of as high as 21 passengers.[1] Today, the carriers are flying aircraft which were beyond the wildest dreams of the industry back in 1938. The Boeing 747 will carry in excess of 400 passengers. The DC-10 and L-1011 will carry in excess of 300 passengers.[2]

If a market generated 110 passengers a day in each direction it could support ten daily round trips with a DC-3 (configured as it was in the 30's and 40's with 21 seats) at a 52.5 percent load factor.[3] If this same route was flown in 1973 with one daily round trip using a 747 configured at 330 seats, the market would produce only a 33.3-percent load factor on this one flight.

In order to get a proper perspective of the true market economics of today's jet age equipment, I am attaching hereto as Appendix A a breakdown of the annual passengers required in any given market to produce varying load factors with varying frequencies of operation. The figures are broken down for one- and two-carrier operations for the DC-9-30, 727-100, 727-200, DC-10, L-1011, and the 747. Taking the DC-10 as an example, page 3 of Appendix A, if a carrier wanted to operate two daily round trips in any market with such equipment

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[1] The famed DC-3 entered service on June 25, 1936, with a seating capacity of 21.

[2] It should be pointed out that present configurations as flown are approximately 330 seats for the 747 and 220 seats for the DC-10 and L-1011.

[3] In the DPFI, Phase 6-B, the Board found 52.5 percent to be a reasonable short-term industry load-factor standard. It further found a 55-percent load factor to be achievable in the long term.

it would be necessary for that market to generate 168,630 annual passengers for the carrier to operate with a 52.5-percent load factor. This, of course, assumes that every passenger in the market will travel on these two flights. Appendix B is broken down in the same manner as Appendix A. However, it specifies the average daily passengers needed in both directions in a given market to achieve the desired load factors.

In the Board's recent decision in the *Additional Service to San Diego Case (San Diego-Denver)*, Docket 18104, order 72-12-29, the Board stated at page 12 of its order: "The Board believes that the demand of a second market should not be the justification for awarding competitive service in the primary market. . . ." Bearing in mind this holding of the Board, we can look at the true economics of competition in the Houston-Miami market.

Houston Miami is a market of 960 miles in length well suited to the use of narrow- and wide-body equipment. In 1971, this market generated 87,570 local passengers and 27,740 connecting passengers, for a total of 115,310 true O & D and connecting passengers.[4]

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[4] The majority on page 12 of their opinion allege that "the dissent's [traffic] computations include only local and interline connecting passengers in the Houston-Miami market and wholly disregard the extensive pools of on-line support traffic available to Continental west of Houston." However, these "extensive pools" of traffic include not only passengers presently using the Houston gateway to Miami but also include a substantial number of passengers currently moving via existing single-plane services. The former classifications are, of course, included in our calculations. The latter obviously would not desert superior service to avail themselves of Continental's new authorization. Again it must be pointed out that this case was set down and is before the Board solely to consider the needs of the Houston-Miami market, and not the needs of the Miami-Southwest United States markets. As this Board said in the San Diego-Denver case, *supra*, "the demand of a second market should not be the justification for awarding competitive service in the primary market. . . ."

Assuming a 10-percent[5] growth in this market for 1973 to 126,841 true O & D and connecting passengers, what kind of service would be required to achieve varying load factors? The table below shows the load factors National would achieve under varying assumptions of the percentage of the market which would use the nonstop service. The first set of figures is based upon the use of 727-200 equipment configured for 130 seats. The second set of figures is based upon the use of DC-10 equipment configured for 249 seats.

ONE-CARRIER SERVICE

% of Market Using Nonstop Service	Passengers Using Nonstop Service	Passenger Load Factor With 727-200 Service (%)			Passenger Load Factor With DC-10 Service (%)		
		1 R.T.	2 R.T.	3 R.T.	1 R.T.	2 R.T.	3 R.T.
90	156.4	[1]	60.2	40.1	62.8	31.4	20.9
80	139.0	[1]	53.5	35.6	55.8	27.9	18.6
70	121.6	93.5	46.8	31.2	48.8	24.4	16.2
60	104.3	80.2	40.1	26.7	41.9	20.9	14.0
50	86.9	66.8	33.4	22.3	34.9	17.4	11.6
40	69.5	53.4	26.7	17.8	27.9	14.0	9.3

[1] Only 130 passengers could be carried or 74.8 percent of the market.

National has been providing and will continue to provide regular and more frequent one-stop flights in this market. In the light of this fact even if 90 percent of the passengers in this market were to use the nonstop service, this market could only support two daily nonstop round trips with a 727-200. A third flight would give the carrier a 40.1-percent overall load factor, *i.e.*, clearly excess capacity.

[5] In view of the fact that the local traffic in this market declined from 1970 to 1971 and the manned space program creating a great deal of community of interest between Houston and Miami has been curtailed, I feel that a 10-percent growth for the calendar years 1972 and 1973 is not unrealistic.

National now has DC-10 service in this market. If they were to operate only one daily nonstop round trip with this plane it could be expected that somewhere between 40 and 70 percent of the passengers might choose that flight. If that were so, then the carrier would operate that flight with a load factor ranging from 27.9 percent to 48.8 percent. More service with either type of equipment would amount to wasteful and excessive capacity according to every Board standard.

To get a true picture of what competition in this market will mean, let us assume that the majority is right in its estimate of 150,000 passengers for 1973. If 95 percent of the market used one-carrier service, this would produce 195.2 passengers per day in each direction or 97.6 per carrier. The table below shows the number of nonstop seats required per carrier to meet the Board's DPFI standard of 52.5-percent and 55-percent load factor under varying assumptions of the percentage of market using nonstop service.

SERVICE REQUIRED PER CARRIER

% of Market Using Nonstop Services	Passengers Using Nonstop Service	Seats Required @ 52.5%	@ 55%
90	87.8	167.2	159.6
80	78.1	148.8	142.0
70	68.3	130.1	124.2
60	58.6	111.6	106.5
50	48.8	93.0	88.7

If National and Continental equally divide the passengers using nonstop service and operate 727-200 equipment over the segment, the following chart reflects the resulting load factor. Note the difference in loads is due to the fact that National operates its equipment with

130 seats and Continental operates its equipment with only 110 seats.

PASSENGER LOAD FACTOR WITH 727-200

% of Market Using Nonstop Service	Passengers Using Nonstop Service	One Round Trip Per Carrier (%) CO	NA	Total	Two Round Trips Per Carrier (%) CO	NA	Total
90	87.8	79.8	67.5	73.2	39.9	33.8	36.6
80	78.1	71.0	60.1	65.1	35.5	30.0	32.5
70	68.3	62.1	52.5	56.9	31.0	26.3	28.5
60	58.6	53.3	45.1	48.8	26.6	22.5	24.4
50	48.6	44.2	37.4	40.5	22.1	18.7	20.3

Note that if each carrier operated only two round trips a day with a 727-200 and they captured 90 percent of the total market, the two carriers would obtain less than a 37-percent load factor—wasteful and excessive competition by anyone's standards.

If National and Continental equally divide the passengers using nonstop service and operate DC-10 equipment over the segment, the following chart reflects the resulting load factor. Note again the difference in loads is due to different seating density—200 for Continental and 249 for National.

PASSENGER LOAD FACTOR WITH DC-10

% of Market Using Nonstop Service	Passengers Using Nonstop Service	One Round Trip Per Carrier (%) CO	NA	Total	Two Round Trips Per Carrier (%) CO	NA	Total
90	87.8	43.9	35.3	39.1	22.0	17.6	19.6
80	78.1	39.1	31.4	34.8	19.5	15.7	17.4
70	68.3	34.2	27.4	30.4	17.1	13.7	15.2
60	58.6	29.3	23.5	26.1	14.7	11.8	13.1
50	48.8	24.4	19.6	21.7	12.2	9.8	10.9

It should be clear from the two preceding charts that the concept of improved nonstop service because of competition is highly illusory.

The ability of National to schedule Houston-Miami via the intermediate point New Orleans will draw Houston-Miami passengers because of the limited amount of nonstop service which can be economically supported. This factor in turn will limit the need for competitive service in the nonstop market.

In a market of this limited size with a strong intermediate point with balanced traffic flows to each end of the proposed nonstop segment, competition will not be economically viable and will act as a deterrent to the industry in reaching a 12 percent rate of return. Competition will have to be cross subsidized from earnings of carriers in other markets or by the public ultimately through fare increases.

National states in its brief to the Board that in the event no new authority is given in this proceeding that they would put on one more daily nonstop round trip in this market in addition to the 1½ round trips it presently offers. As we have seen in the table on page 3, three daily nonstop round trips with a 727-200 capturing 90 percent of the market, will only generate a load factor for National of 40.1 percent. Two daily flights will generate load factors of 60.2 percent. Under these circumstances the offering of 2½ daily nonstop round trips should give an overall load factor balance in the low 50's, a figure entirely consistent with the Board's standards of 52.5 percent and 55 percent.

Given these economic realities it is incumbent to take one further step. In every well run business enterprise, every new undertaking of major significance is preceded by some type of cost-benefit study. What will have to be the outlay? What will be the benefits received? This same cost-benefit technique should be a part of every new

award of route authority under the Federal Aviation Act.

We have seen above that if no new authority is granted in this proceeding National will offer 2½ daily nonstop round trips in the market in addition to several one- and two-stop frequencies. If Continental is granted certificate authority, as the majority is here deciding to do, National will offer 1½ daily nonstop round-trip frequencies and Continental will offer four daily nonstop round-trip frequencies with 727-200 equipment. This will give the market a total of 5½ daily nonstop round-trip flights.

What are the benefits to the Houston-Miami market and its passengers?

(1) The public have three more daily nonstops in each direction to choose from.

(2) Some passengers who would otherwise have taken a one-stop flight will now save 30 to 45 minutes on a 960-mile trip.

What are the costs?

(1) The three extra daily nonstops in each direction will cost the air transportation system and eventually the traveling public $3,725,000 in additional direct operating expenses every year.[6]

(2) At a time when the supply of jet fuel is becoming a major element of concern to the industry,

[6] Taken from exhibit CO-406, page 1. This figure is three-fourths of the direct operating costs for four daily nonstop frequencies. Assuming 150,000 passengers in the market, 90 percent using the 5½ daily nonstop services on an equal basis per flight, this cost breaks down to approximately $50 per passenger for those who would be using the three extra flights. In the long run, it would be more beneficial to the system and the traveling public to pay $45 to each of these passengers and have them use the less frequent service which is more economically attuned to the demands of the market.

these three flights will annually consume 7,734,-786 gallons of fuel.[7]

(3) Residents around the Houston-Miami airports will be exposed to the noise from 5,380 more takeoffs and landings per year.

(4) Wasteful and excessive capacity will be operated in the market.

Just how wasteful these additional flights are can be seen from the following. Let us assume, as the majority does, that the market will grow from 115,310 passengers a year in 1971 to 150,000 passengers a year in 1973. Let us further assume that 90 percent of these passengers will travel on the nonstop service. This means that each flight will operate with 33.6 passengers on board or a load factor of 30.5 percent for Continental and 25.6 percent for National.[8] This type of wasteful and excessive capacity does not square with reasonable economics.

The Board cannot have a system of dual standards—one for fixing rates and one for awarding routes. Once the Board has established a rate standard which requires the carriers to maintain a 52.5-percent to 55-percent industry load factor, it is improper to make route awards which would do violence to that standard.

In summary, the award of additional competition in the Houston-Miami market is contrary to the sound economic regulation of the United States air transportation system.

/s/ ROBERT D. TIMM

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[7] Fuel consumption based upon 1,444 gallons per annual block hour per flight. Block hours taken from exhibit CO-406 and figured at 1785.5 per flight annually.

[8] The difference in load factors again is accounted for by the fact that Continental operates its 727-200 with 110 seats and National with 130 seats.

	Annual Passengers Required to Produce Load Factors of *								
	40%	45%	50%	52.5%	55.0%	60%	65%	70%	75%
In single-carrier market with the following daily nonstop round trips with 727-100 or DC 9-30 equipment [1]									
1	28,032	31,536	35,040	36,792	38,544	42,048	45,552	49,056	52,560
2	56,064	63,072	70,080	73,584	77,088	84,096	91,104	98,112	105,120
3	84,096	94,608	105,120	110,376	115,632	126,144	136,656	147,168	157,680
4	112,128	126,144	140,160	147,168	154,176	168,192	182,208	196,224	210,240
5	140,160	157,680	175,200	183,960	192,720	210,240	227,760	245,280	262,800
In 2-carrier markets with each carrier operating the following daily nonstop round trips with 727-100 or DC-9-30 equipment [1]									
1	56,064	63,072	70,080	73,584	77,088	84,096	91,104	98,112	105,120
2	112,128	126,144	140,160	147,168	154,176	168,192	182,208	196,224	210,240
3	168,192	189,216	210,240	220,752	231,264	252,288	273,312	294,336	315,360
4	224,256	242,288	280,320	294,336	308,352	336,384	364,416	392,448	420,480
5	280,032	315,360	350,400	367,920	385,440	420,480	455,520	490,560	525,600

* Assuming all traffic in the market travels on these flights.

[1] 96 available seats assumed as average capacity.

Annual Passengers Required to Produce Load Factors of *

	40%	45%	50%	52.5%	55.0%	60%	65%	70%	75%
In single-carrier market with the following daily nonstop round trips with 727-200 equipment [1]									
1	36,208	40,734	45,260	47,523	49,786	54,312	58,838	63,364	67,890
2	72,416	81,468	40,520	95,046	99,572	108,624	117,676	126,728	135,780
3	108,624	122,202	135,780	142,569	149,358	162,936	176,514	190,092	203,670
4	144,832	162,936	181,040	190,092	199,144	217,248	235,352	253,456	271,560
5	181,040	203,670	226,300	237,615	248,930	271,560	294,190	316,820	339,450
In 2-carrier markets with each carrier operating the following daily nonstop round trips with 727-200 equipment [1]									
1	72,416	81,468	90,520	95,046	99,572	108,624	117,676	126,726	135,780
2	144,832	162,936	181,040	190,092	199,144	217,248	235,352	253,456	271,560
3	217,248	244,404	271,560	285,138	298,716	325,872	353,028	380,184	407,340
4	289,664	325,872	362,080	380,184	398,288	434,496	470,704	506,912	543,120
5	362,080	407,340	452,600	475,230	497,860	543,120	588,380	633,640	678,900

* Assuming all traffic in the market travels on these flights.

[1] 124 available seats assumed as average capacity.

	Annual Passengers Required to Produce Load Factors of *								
	40%	45%	50%	52.5%	55.0%	60%	65%	70%	75%
In single-carrier market with the following daily nonstop round trips with DC-10 or L-1011 equipment [1]									
1	64,240	72,270	80,300	84,315	88,330	96,360	104,390	112,420	120,450
2	128,480	144,540	160,600	168,630	176,660	192,720	208,780	224,840	240,900
3	192,720	216,810	240,900	242,945	264,990	289,080	313,170	337,260	361,350
4	256,960	289,080	321,200	337,260	353,320	385,440	417,500	449,680	481,800
5	321,200	361,350	401,500	421,575	441,650	481,800	521,950	562,100	602,250
In 2-carrier markets with each carrier operating the following daily nonstop round trips with DC-10 or L-1011 equipment [1]									
1	128,480	144,540	160,600	168,630	176,660	192,720	208,780	224,840	240,900
2	256,960	289,080	321,200	337,260	353,320	385,440	417,560	449,680	481,800
3	385,440	433,620	481,800	505,890	529,980	578,160	626,340	674,520	722,700
4	513,920	578,160	642,400	674,520	706,640	770,880	835,120	899,360	963,600
5	642,400	722,700	803,000	843,150	883,300	963,600	1,043,900	1,124,200	1,204,500

* Assuming all traffic in the market travels on these flights.

[1] 220 available seats assumed average capacity.

	Annual Passengers Required to Produce Load Factors of *								
	40%	45%	50%	52.5%	55.0%	60%	65%	70%	75%
In single-carrier market with the following daily nonstop round trips with 747 equipment [1]									
1	96,360	108,405	120,450	126,473	132,495	144,540	156,585	168,650	180,675
2	192,720	216,810	240,900	252,945	264,990	289,080	313,170	337,260	361,350
3	289,080	325,215	361,350	379,418	397,485	433,620	469,755	505,890	542,025
4	385,440	433,620	481,800	505,890	529,980	578,160	626,340	674,520	722,700
5	481,800	542,025	602,250	632,363	662,475	722,700	782,925	843,150	903,375
In 2-carrier markets with each carrier operating the following daily nonstop round trips with 747 equipment [1]									
1	192,700	216,810	240,900	252,945	264,990	289,090	313,170	337,260	361,350
2	385,440	433,620	481,800	505,890	529,980	578,160	626,340	674,520	722,700
3	578,160	650,430	722,700	758,835	794,970	867,240	939,510	1,011,780	1,084,050
4	770,880	867,240	963,600	1,011,780	1,059,960	1,156,320	1,252,680	1,349,040	1,445,400
5	963,600	1,084,050	1,204,500	1,264,725	1,324,950	1,445,400	1,565,850	1,686,300	1,806,750

* Assuming all traffic in the market travels on these flights.
[1] 330 available seats assumed as average capacity.

	Average Daily Passengers Required to Produce Load Factors of *								
	40%	45%	50%	52.5%	55%	60%	65%	70%	75%
In single-carrier market with the following daily nonstop round trips with 727-100 or DC-9-30 equipment [1]									
1	76.8	86.4	96.0	100.8	105.6	115.2	124.8	134.4	144.0
2	153.6	172.8	192.0	201.6	211.2	230.4	249.6	268.8	288.0
3	230.4	259.2	288.0	302.4	316.8	345.6	374.4	403.2	432.0
4	307.2	345.6	384.0	403.2	422.4	460.8	499.2	537.6	576.0
5	384.0	432.0	480.0	504.0	528.0	576.0	624.0	672.0	720.0
In 2-carrier markets with each carrier operating the following daily nonstop round trips with 727-100 or DC-9-30 equipment [1]									
1	153.6	172.8	192.0	201.6	211.2	230.4	249.6	268.8	288.0
2	307.2	345.6	384.0	403.2	422.4	460.8	499.2	537.6	576.0
3	460.8	518.4	576.0	604.8	633.6	691.2	748.8	806.4	864.0
4	614.4	691.2	768.0	806.4	844.8	921.6	998.4	1,075.2	1,152.0
5	767.2	864.0	960.0	1,008.0	1,056.0	1,152.0	1,248.0	1,344.0	1,440.0

* Assuming all traffic in the market travels these flights.

[1] 96 available seats assumed as average capacity.

	Average Daily Passengers Required to Produce Load Factors of *								
	40%	45%	50%	52.5%	55%	60%	65%	70%	75%
In single-carrier market with the following daily nonstop round trips with 727-200 equipment [1]									
1	99.2	111.6	124.0	130.2	136.4	148.0	161.2	173.6	186.0
2	198.4	223.2	248.0	260.4	272.8	297.6	322.4	347.2	372.0
3	297.6	334.8	372.0	390.6	409.2	446.4	483.6	520.8	558.0
4	396.8	446.4	496.0	520.8	545.6	595.2	644.8	694.4	744.0
5									
In 2-carrier markets with each carrier operating the following daily nonstop round trips with 727-200 equipment [1]									
1	198.4	223.2	248.0	260.4	272.8	297.6	322.4	347.2	372.0
2	396.8	446.4	496.0	520.8	545.6	595.2	644.8	694.4	744.0
3	595.2	669.6	744.0	781.2	818.4	892.8	967.2	1,041.6	1,116.0
4	793.6	892.8	992.0	1,041.6	1,091.2	1,190.4	1,289.6	1,388.8	1,488.0
5	992.0	1,116.0	1,240.0	1,302.0	1,364.0	1,488.0	1,612.0	1,736.0	1,860.0

* Assuming all traffic in the market travels on these flights.

[1] 124 available seats assumed as average capacity.

	Average Daily Passengers Required to Produce Load Factors of *								
	40%	45%	50%	52.5%	55%	60%	65%	70%	75%
In single-carrier market with the following daily nonstop round trips with DC-10 or L-1011 equipment [1]									
1	176.0	198.0	220.0	231.0	242.0	264.0	286.0	308.0	330.0
2	352.0	396.0	440.0	462.0	484.0	528.0	572.0	616.0	660.0
3	528.0	594.0	660.0	693.0	726.0	792.0	858.0	924.0	990.0
4	704.0	792.0	880.0	924.0	968.0	1,056.0	1,144.0	1,232.0	1,320.0
5	880.0	990.0	1,110.0	1,155.0	1,210.0	1,320.0	1,430.0	1,540.0	1,650.0
In 2-carrier markets with each carrier operating the following daily nonstop round trips with DC-10 or L-1011 equipment [1]									
1	352.0	396.0	440.0	462.0	484.0	528.0	572.0	616.0	660.0
2	704.0	792.0	880.0	924.0	968.0	1,056.0	1,144.0	1,232.0	1,320.0
3	1,056.0	1,188.0	1,320.0	1,386.0	1,452.0	1,584.0	1,716.0	1,848.0	1,980.0
4	1,408.0	1,584.0	1,760.0	1,848.0	1,932.0	2,112.0	2,288.0	2,464.0	2,640.0
5	1,760.0	1,980.0	2,200.0	2,310.0	2,420.0	2,640.0	2,860.0	3,080.0	3,300.0

* Assuming all traffic in the market travels on these flights.

[1] 220 available seats assumed as average capacity.

	Average Daily Passengers Required to Produce Load Factors of *								
	40%	45%	50%	52.5%	55%	60%	65%	70%	75%
In single-carrier market with the following daily nonstop round trips with 747 equipment [1]									
1	264.0	297.0	330.0	346.5	363.0	396.0	429.0	462.0	495.0
2	528.0	594.0	660.0	693.0	726.0	792.0	858.0	924.0	990.0
3	792.0	891.0	990.0	1,039.5	1,089.0	1,188.0	1,287.0	1,386.0	1,485.0
4	1,056.0	1,188.0	1,320.0	1,386.0	1,452.0	1,584.0	1,716.0	1,848.0	1,980.0
5	1,320.0	1,485.0	1,650.0	1,732.5	1,815.0	1,980.0	2,145.0	2,310.0	2,475.0
In 2-carrier markets with each carrier operating the following daily nonstop round trips with 747 equipment [1]									
1	528.0	594.0	660.0	693.0	726.0	792.0	858.0	924.0	990.0
2	1,056.0	1,188.0	1,320.0	1,386.0	1,452.0	1,584.0	1,716.0	1,848.0	1,980.0
3	1,584.0	1,782.0	1,980.0	2,079.0	2,178.0	2,376.0	2,574.0	2,772.0	2,970.0
4	2,112.0	2,376.0	2,640.0	2,772.0	2,904.0	3,168.0	3,432.0	3,696.0	3,960.0
5	2,640.0	2,970.0	3,300.0	3,465.0	3,630.0	3,960.0	4,290.0	4,620.0	4,950.0

* Assuming all traffic in the market travels on these flights.

[1] 330 available seats assumed as average capacity.

APPENDIX

DOCKET 18257

THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE. THE INITIAL DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

Order 73-2-89

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 23rd day of February 1973

Docket 18257

SOUTHERN TIER COMPETITIVE NONSTOP INVESTIGATION
(Houston-Miami Phase)

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof,

IT IS ORDERED THAT:

1. An amended certificate of public convenience and necessity in the form attached hereto be issued to Continental Air Lines, Inc., for route 29;

2. Said certificate shall be signed on behalf of the Board by its Secretary, shall have affixed thereto the seal of the Board, and, subject to the extension of its effective date in accordance with the provisions of said certificate, shall be effective on April 24, 1973: *Provided, however,* That the effective date of said certificate shall be automatically postponed until further Board order if the appropriate license fee is not paid pursuant to section 389.21(b) of the Regulations; and

3. Except to the extent granted herein, all applications, requests, and motions involved herein be and they hereby are denied, and this investigation be and it hereby is terminated.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

[SEAL]

APPENDIX D

Order 73-5-22

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 4th day of May 1973

Docket 18257

SOUTHERN TIER COMPETITIVE NONSTOP INVESTIGATION

(Houston-Miami Phase)

OPINION AND ORDER ON RECONSIDERATION

BY THE BOARD:

On February 23, 1973, the Board issued its decision in the remanded phase of this proceeding (Order 73-2-89), in which it found the need for competitive Houston-Miami nonstop service and selected Continental Air Lines for the award. Petitions for reconsideration of Order 73-2-89 were filed by American Airlines, Inc., Braniff Airways, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., and Texas International Airlines, Inc. (TXI), suggesting that they, rather than Continental, be selected for the award. In addition, National Airlines filed a petition opposing any award of nonstop competitive authority. Answers to the petitions were filed by Braniff, Continental, Delta, Eastern, and National. Answers generally opposed to reconsideration have also been filed by the communities of Austin, El Paso, Houston, Midland/Odessa, and San Antonio, Texas; Phoenix and Tucson, Arizona; and Wichita, Kansas.

The Board has duly considered the matters presented. The four members of the Board being equally divided as to whether the new authority awarded to Continental by Order 73-2-89 should stand or be withdrawn, the petitions fail for want of a majority.

The following opinion represents the views of those present Board members (Members Minetti and Murphy) who concurred in the Board's original decision in Order 73-2-89. It is partially concurred in, to the extent indicated in their separate concurring and dissenting statement, by those present Board members (the Chairman and Vice Chairman) who dissented from the Board's original decision.

1. In arguing, on reconsideration, that Continental's application must be denied, Delta makes essentially two contentions. First, the carrier asserts that the Board's decision in this proceeding is at odds with its simultaneously published decision in the *Southern Airways Route Realignment Investigation*, Docket 18610, and, second, the carrier claims that the award to Continental violates the *Ashbacker* principle. Delta's first argument was discussed in detail in the Board's original opinion in the *Southern Route Realignment Case*, Order 73-2-90, February 23, 1973, and is further discussed in the Board's order on reconsideration in that proceeding, Order 73-4-92, April 23, 1973. It need not be addressed here.

Delta's claim that the Board's award violates the *Ashbacker* doctrine has been considered and rejected both by Judge Dapper and the Board (see Order 73-2-89, pp. 13-15). However, since Delta has amplified and, in several significant respects, altered its underlying contentions in seeking reconsideration, some additional comment is desirable.

Delta contends that the *Ashbacker* principle requires that the Board either (a) expand the scope of the pro-

ceeding to include contemporaneous consideration of certain new route proposals by Delta or (b) impose a restriction upon the authorization to Continental (or, similarly, any potential award to American, Braniff, or TXI, for that matter) which would preclude effective through-service via Houston between Miami and certain cities west of Houston.[1] If there were such a restriction, according to Delta, there would then be no basis for selecting Continental in preference to Delta for the Miami-Houston route. Additionally, Delta asserts that the Board, although ostensibly considering service between Miami and Houston (having previously determined not to turn the *Southern Tier* case into an area investigation) has, in fact, erroneously decided the proceeding on the basis of area considerations. These contentions, which the Board finds lacking in merit, are best evaluated in light of Delta's procedural posture before the Board, the evidence which Delta adduced relating to its *Ashbacker* claim, and the findings thus far made concerning that claim.

The Delta applications, which were excluded from the *Southern Tier* investigation, involved requests for transcontinental routes. Specifically, Delta sought consolidation of its application for the following route segments:

1. Between the terminal point Miami-Ft. Lauderdale, the intermediate points Tampa-St. Petersburg-Clearwater, Orlando - Melbourne - Titusville - Cocoa Beach, New Orleans, Houston and San Antonio, and

[1] In its petition for reconsideration, Delta includes Miami-Albuquerque (which Continental does not propose to serve) as one of the "prohibited" beyond markets, despite the fact that on brief to the Board it listed only Miami-El Paso/Phoenix/San Antonio as markets in which our award would "effectively inject Continental." Of course, findings with respect to Delta's Ashbacker claim apply equally to the Miami-Albuquerque market.

(a) beyond San Antonio, the intermediate point San Diego, and the coterminal points San Francisco-Oakland and Los Angeles-Long Beach, and

(b) beyond San Antonio, the intermediate point Las Vegas, and the coterminal points San Francisco-Oakland and Los Angeles-Long Beach, and

(c) beyond San Antonio, the intermediate points Dallas-Fort Worth, the alternate intermediate points Albuquerque and El Paso, the intermediate point Phoenix, and

(i) beyond Phoenix the intermediate point San Diego and the coterminal points Los Angeles-Long Beach and San Francisco-Oakland, and

(ii) beyond Phoenix the intermediate point Las Vegas, and the coterminal points San Francisco-Oakland and Los Angeles-Long Beach.

2. A. Between the coterminal points San Francisco-Oakland and Los Angeles-Long Beach, Calif., the intermediate point San Diego;

B. Between the co-terminal points Los Angeles-Long Beach and San Francisco-Oakland;

and the intermediate point Phoenix, Ariz., the alternate intermediate points Albuquerque, N.M. and El Paso, Tex., the intermediate points Fort Worth-Dallas, Tex., Memphis, Tenn., Huntsville, Ala., Atlanta, Ga., Jacksonville, Orlando-Melbourne-Titusville-Cocoa Beach, Tampa, and the terminal point Miami-Fort Lauderdale, Fla.

Following the Board's refusal to consolidate these applications in their entirety, Delta next moved for judicial intervention. The Court of Appeals dismissed the carrier's petition, pointing out that there was no requirement for consolidation as a matter of law, and taking cognizance of the Board's standard procedure of permit-

ting applicants with excluded applications to make a factual demonstration that mutual exclusivity does, in fact, exist. *National Airlines et al.* v. *CAB*, 392 F.2d 380 (D.C. Cir. 1968).

Thereafter, in the original phase of this proceeding, Delta submitted exhibits showing the service which it proposed to operate over the "excluded routes." The carrier's proposal (DL-200 I) included no flights via Houston between Miami and El Paso, San Antonio, or Phoenix. Instead, all such flights were to be operated either on a nonstop basis, or via New Orleans or Dallas. At the conclusion of that proceeding, Delta received the Houston-Miami award, but the Board's decision was reversed and remanded by the Court of Appeals. *Continental Air Lines, Inc.* v. *CAB*, 443 F.2d 745 (D.C. Cir. 1971).

In the remanded proceeding, following Delta's presentation of evidence, the administrative law judge rejected Delta's contention that Continental's entry into the Miami-El Paso/Phoenix/San Antonio markets on a one-stop basis via Houston would preclude an award to Delta of the authority which it had sought. He found that the nonstop authority which Delta had requested was "so manifestly superior to the one-stop authority which Continental could receive . . ." that there would be no mutual exclusivity or prejudice to Delta's application and that "a subsequent grant of Delta's application would not be precluded by an award to Continental." (I.D. 63-64). In challenging Judge Dapper's conclusion on brief to the Board, Delta argued that the operation of one-stop service by Continental could preclude nonstop service in that there was "competitive near-parity of nonstop and one-stop services." The Board found Delta's claim unpersuasive for two reasons. First, the Board agreed with Judge Dapper that there would be no mutual exclusivity as a matter of law or economic fact between Continental's single-plane service via Houston

and Delta's application for nonstop rights between Miami and the cities concerning which it now complains. Second, the Board found that the limited traffic flow in the "excluded" markets was too small to support a nonstop award regardless of Continental's presence. Delta made no mention, however, at this stage of the proceeding, about having sought one-stop as well as nonstop rights. Nor did it allege that the award to Continental would preclude additional one-stop operations by Delta.

Delta now asserts, for the first time, that the Board erred in failing to determine whether a grant of Continental's application would preclude a grant of *one-stop* authority between Miami, on the one hand, and the west of Houston cities, on the other. The carrier takes the position that there would be mutual exclusivity between service operated pursuant to our Houston-Miami award to Continental and service which could be operated pursuant to Delta's excluded application. However, to begin with, Delta ignores the fact that its excluded application was for service to these west-of-Houston points only in conjunction with other transcontinental services along the southern tier of states, and did not involve only a request for authority between Miami and the particular cities involved. *Ashbacker* does not require the Board to split an "unrestricted application into small sections and . . . [compare such sections] with similarly segregated sections of other applications . . . ." *Delta Air Lines* v. *CAB*, 275 F.2d 632, 645 (D.C. Cir. 1959). Moreover, even if the Board were required to undertake such a task, Delta has still failed to develop a record appropriate for that purpose. Specifically, the only evidentiary support in the remanded proceeding for Delta's claim of mutual exclusivity appears in exhibits DL-901-905. These exhibits simply show O&D and interline connecting traffic in the Miami-Albuquerque, Miami-El Paso, Miami-Phoenix, and Miami-San Antonio markets. The point of these exhibits is that traffic in these markets does not

approach the 100 passenger a day "standard" which was used by the Board in 1966 (*Gulf States-Midwest Points Service Investigation*, Order E-24202, September 19, 1966) as a benchmark for considering an award of competitive nonstop service; and, thus, that Continental's entry into the markets would preclude an award of competitive nonstop authority to Delta.[2] However, to the extent that Delta now argues that Continental's operations would preclude—as an economic matter—other *one-stop* operations, its new contention is without record support because such an economic issue cannot be decided by considering only Miami-El Paso/Phoenix/Albuquerque/San Antonio traffic data alone, *i.e.*, without also examining intermediate traffic support (*e.g.*, Miami-New Orleans/ Dallas and Dallas/New Orleans-El Paso/Phoenix/Albuquerque/San Antonio) which would have been available to support Delta's flights. Indeed, since all of Delta's flights were to continue on to the west coast, passenger movements between all these points and the west coast would also have had to be included.[3] By limiting its evidentiary showing to a recital of traffic in the Miami-El Paso/Phoenix/San Antonio/Albuquerque markets, Delta has not established that Continental's operations would

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[2] It was these exhibits which the Board originally considered by noting that the limited traffic flows in the Miami-El Paso and Miami-Phoenix markets, viewed alone, would not be likely to support a nonstop award regardless of Continental's presence. (Original Opinion at pp. 14-15.)

[3] Similarly, although Delta cites numerous exhibits on the mutual exclusivity question that it introduced in the original Southern Tier record, only two of these (DL-400 I and 401 I) have even the remotest connection with the markets at issue. The latter exhibits, however, apart from being dated, are largely irrelevant because they were designed to show that an unrestricted Florida-California award in Southern Tier would preclude a subsequent award of Florida-California authority via Albuquerque, El Paso, Phoenix or San Antonio. By contrast, the two-stop Miami-Los Angeles authority Continental will receive in this case will permit it to participate in only a negligible share of this market.

preclude Delta's proposed routings in the "excluded" markets. Thus, there is no more basis for a finding of legal or actual exclusivity with respect to the one-stop services than for the nonstop operations. Under these circumstances, there is no need to reach the question of what conditions or restrictions, if any, might have been required if Delta had been able to show mutual exclusivity.

Next, the Board rejects Delta's argument that having decided not to turn *Southern Tier* into an area investigation, the Board committed legal error in selecting Continental for the Miami-Houston route largely on the basis of its ability to mount more local frequencies as a result of its extensive pool of Houston-West support traffic and its advantage in beyond benefits. Delta's underlying assumption—that factors of route integration and beyond benefits are "area considerations"—is a *non-sequitur.* Route integration and beyond benefits are basic carrier selection factors even in proceedings where only one market is at issue. For example, these were important considerations in the Board's choice of Delta over Continental in the *Dallas/Ft. Worth-Phoenix Nonstop Service Case,* Order 69-7-137, which, with the service needs of only one market at issue, was clearly not an area investigation.

The importance of route integration stems from the fact that certificated carriers do not serve any city-pair in a vacuum. As the Board observed recently:

> Certificated operations at any particular city or market must be considered in the context of the entire route system of the airline performing the service, because that point or market is, in fact, served as part of a route network, rather than as an independent entity. Significantly, when the Board decides to place a particular city on the certificated system it does so not simply on an abstract finding that the point deserves certificated service. Instead, the Board

> is required to consider as a key decisional criterion whether the point can be served economically by the specific applicants involved, a determination which, in turn, depends on such factors as how well the new award would integrate with each applicant's route structure . . ." Order 72-9-39 at pp. 8-9.

Thus, the Board cannot realistically evaluate competing applications for authority in a specific market without taking note, for example, of the fact that one applicant's existing system, by providing back-up traffic support, enables it to schedule more service on an economic basis in the primary market at issue. That is precisely the situation here, since Continental's reserve of Houston-west support traffic permits the carrier to offer more Houston-Miami nonstop service than any other applicant. Far from being an "area consideration," this factor bears directly on the issue of Houston-Miami service.

Similarly, the Board traditionally considers the service benefits an applicant can bring to passengers in beyond markets as an adjunct to its flights in the primary market. In much the same way, it considers the harm (through diversion) that the carrier might cause to incumbents in these beyond markets. There is, however, an important distinction between considering benefits to a beyond market—Miami-Phoenix, for example, on a Miami-Houston-Phoenix routing—and evaluating the service needs of the same market independently (*i.e.*, turning it into a primary market).

Curiously, Delta has had no trouble in grasping this distinction in other contexts. For example, in the *Southern Route Realignment* case the Board awarded Delta Memphis-Miami authority partly because of the beyond benefits the carrier proposed in the Kansas City-Miami market. In refuting Southern's objection that the needs of Kansas City-Miami were not in issue, Delta said,

"Southern apparently does not understand the difference between an issue of need and a benefit. The "need" of Kansas City-Miami was *not* at issue, whereas such potential benefits were, and historically are, taken into account as one of the factors in carrier selection."

In addition, Delta's reliance on *Delta Air Lines v. CAB*, 275 F.2d 632 (D.C. Cir. 1957) is misplaced. Unlike the situation in that case, Delta has been permitted and has had ample opportunity to demonstrate that any award in this case is mutually exclusive with Delta's application for Miami-El Paso/Phoenix/San Antonio unrestricted rights which the Board refused to consolidate into *Southern Tier*. As the Board (and Judge Dapper) found, Delta has simply failed to prove mutual exclusivity. (It is typical of Delta's posture in this proceeding that the *Second Delta* case, on which the petition for reconsideration now relies so heavily, was mentioned neither in the carrier's brief to the administrative law judge nor in its brief to the Board.)

Lastly, it should be emphasized that the *Ashbacker* doctrine is not available simply for tactical maneuvering purposes by particular applicants in route proceedings. As the courts have made quite clear, the Board is not required to tailor its proceedings so as to equalize the advantages and disadvantages with which each applicant enters a comparative proceeding. A single carrier, therefore, cannot simply file a defensive application for unrestricted rights and compel the Board to choose between a massive investigation of the whole of American air transportation, on the one hand, and the wholesale imposition of artificial restrictions which would—by excluding such a basic consideration as route integration—seriously compromise the public need for an adequate air transportation system. In the final analysis, considerations of administrative fairness and the public convenience and necessity must govern.

2. The Board rejects TXI's argument that the local service carrier's application was improperly evaluated. While TXI now argues that it possesses "*authority* to serve every one of the segment markets to which Continental proposes service except those involving Phoenix, Tucson, Portland and Seattle . . .," (emphasis supplied) it does not challenge the Board's basic findings that Continental has proposed—and would provide—a greater volume of service in the primary market, a broader range of services, and more first single-plane and overall single-carrier benefits in beyond markets. These factors were material. Moreover, apart from these largely undisputed conclusions, the Board expressed a further doubt that TXI would be able to operate successfully even the competitive service projected in its proposal—let alone earn a profit sufficient to make a positive contribution to the carrier's subsidy need. TXI's contentions with regard to the comparative appraisal of financial results thus also overlooks the fact that subsidy considerations represent a carrier selection factor which is unique to the evaluation of local service carrier applications.[4]

TXI is also incorrect in suggesting that the Board never departs from standard formulas (such as QSI or Subpart K costing) to consider special or unusual factors associated with applications of particular carriers. See, *e.g.*, *Alaska Service Investigation*, Order 71-12-45, December 9, 1971, pp. 8-13, *Additional Service to Columbia and Augusta Case*, Order 71-7-118, July 21, 1971, pp. 10-11, and, *Gulf States-Midwest Points Service Investigation*, Order 69-9-18, September 3, 1969, p. 4. Moreover, in this particular situation, in considering the competing applications of Continental and TXI, it would have been inappropriate to overlook the special expenses associated with TXI's extension to Miami at the same

[4] See, *e.g.*, Indianapolis/Dayton-New York Subpart M Case, Order 69-8-130, August 24, 1969, at 2.

time that Continental had expressly included a separate $850,000 expense element to reflect similar special costs.

Finally, this case is distinguishable from the earlier award to TXI of new Houston-Mexico City authority, where it was found, *inter alia*, that the local service carrier would be able to provide service to more points than the other applicant and also achieve a subsidy need reduction. In both cases concern was expressed over the prospective economics of the local service carrier's proposed operations, including the problem of adequately measuring developmental costs through the Subpart K methodology. Doubts in this connection were resolved in favor of a Houston-Mexico City award—notwithstanding TXI had to open a new station at Mexico City—since the prospects for subsidy improvement were significantly greater, in part because the new award extended the carrier's system from a fairly weak terminal point (Monterrey) to the far stronger terminal at Mexico City.[5]

3. Eastern, Braniff, and TXI seek the imposition of various restrictions on Continental's ability to schedule through-plane service between Miami and points beyond Houston, in order to minimize the alleged potential diversionary effects of the Board's award herein on these carriers. The question of further restrictions on the award—in addition to the two-stop restriction on Miami-Los Angeles service already imposed in order to preserve the Board's decisional flexibility in the pending Miami-Los Angeles case—was discussed at some length in the Board's prior decision (including those portions of the administrative law judge's initial decision adopted by the Board), and that discussion stands.

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[5] See Houston-Monterrey-Mexico City Service Case, Order 72-5-61, served May 18, 1972, pp. 5-7. See also the Board's decision not to authorize TXI's extension to Acapulco in the Texas-Mexico Service Investigation Order 72-7-49, served July 17, 1972, pp. 4-5.

The petitioners now advance several new contentions in support of the imposition of additional restrictions—notably, Eastern's contention that the loss of San Antonio-Miami support traffic occasioned by the Board's award "may well force" Eastern to discontinue its existing San Antonio-New Orleans-Miami flights, and Braniff's contention that it might be exposed to diversion of $3.7 million in the Denver-Miami market alone if Continental were to operate a Houston-Miami service pattern wholly different from that proposed in its exhibits of record.[6] The merits of these new contentions cannot be addressed here, as the Chairman and Vice Chairman do not reach the issue of further restrictions on an award they would not make in the first place, while the remaining two members cannot speak for the Board. However, the Board notes that these new contentions could have and should have been made at an earlier stage of the proceedings, when they could have been dealt with on the merits by a full Board, and should not have been raised for the first time on reconsideration. In particular, Braniff's new $3.7 million diversion calculation, because it was not presented at the hearing and thus was not subjected to cross-examination and rebuttal by the other parties, is of extremely limited evidentiary or persuasive value.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petitions for reconsideration be and they hereby are denied.

2. The motion to strike filed by Continental be and it hereby is denied.[7]

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[6] Braniff's diversion estimate of record, which was fully evaluated by the administrative law judge (I.D. 51-52), totaled less than $2.3 million in *all* markets.

[7] Continental has filed a motion to strike Eastern's answer as being "another" petition for reconsideration.

G. JOSEPH MINETTI and ROBERT T. MURPHY, Members, concurred in the above opinion and order. TIMM, Chairman, and GILLILLAND, Vice Chairman, filed the attached concurrence and dissent.

EDWIN Z. HOLLAND
Secretary

[SEAL]

TIMM, CHAIRMAN, AND GILLILLAND, VICE CHAIRMAN, CONCURRING AND DISSENTING:

For the reasons set forth in our earlier dissents, we continue to believe that the competitive route award made in this case is not justified. However, we concur in the Board's order on reconsideration insofar as it holds (1) that the two basic arguments raised by Delta in its petition for reconsideration do not require, as a matter of law, the denial of the application granted by the majority herein; (2) that the Board applied the proper standards in evaluating and denying the application of Texas International; and (3) that the new contentions of various parties which were advanced for the first time on reconsideration, and which could have and should have been put forward at an earlier stage of the proceeding, do not lay a proper foundation for reconsideration. Our concurrence in these conclusions (particularly the first of them) is not to be taken as endorsement of those aspects of the Board's opinion here which inferentially might be thought to support the route award made in Order 73-2-89 on the merits. We repeat that, on the merits, we adhere to our respective original views.

/s/ ROBERT D. TIMM

/s/ WHITNEY GILLILLAND

APPENDIX E

EXCERPTS FROM OPENING BRIEF OF CONTINENTAL AIR LINES, INC. TO ADMINISTRATIVE LAW JUDGE SHEEHAN IN AMERICAN/FRONTIER ROUTE EXCHANGE AGREEMENT, CAB DOCKET NO. 25397

There follows the entirety of Section IV of Continental's December 21, 1973 Brief to Administrative Law Judge Sheehan, appearing at pages 35-41 thereof:

"IV. APPROVAL OF THE AGREEMENT WOULD DENY DUE PROCESS TO CONTINENTAL IN RELATION TO THE PENDING SAN DIEGO CASE

"In its preliminary motions, Continental made clear its concern that approval of this exchange agreement might act to deny Continental's pending application for Denver-San Diego nonstop authority in the *Additional Service to San Diego Case*, Docket 18104. The Board denied Continental's request for a pre-trial restriction against Denver-San Diego single-plane service by Frontier but recognized that consideration of such a restriction is appropriate (Order 73-9-14, September 6, 1973, p. 4):

> 'In the Additional Service to San Diego Case, Docket 18104, Continental has applied for nonstop Denver-San Diego authority. If the exchange agreement is approved in this case, Frontier would be able to provide one-stop service in that market, and Continental is concerned with the possibility that its application for non-stop authority then might be denied on the ground that the market does not need additional service. While such a restriction may be appropriate in any amended certificate that may be issued, we are not prepared to impose it as a pre-trial matter.

> The issues in the case include the question of what conditions, if any, should be imposed if the exchange is approved and Continental may address itself to this matter in the proceeding. . . .'

"Continental's position is the unless this route exchange agreement is denied or Frontier is prohibited from carrying Denver-San Diego traffic, Continental will be denied due process to which it is entitled under the *Ashbacker* doctrine.

"As shown in CO-200, Continental was twice recommended by the Bureau and the Administrative Law Judge to compete with Western as the second nonstop carrier in the San Diego-Denver market. The proceeding began in 1969 and has yet to be completed, notwithstanding a remanded phase which was ordered by the Board to consider the market's ability to support competition. By Order 72-12-29, December 8, 1972, the Board declined to authorize competition solely on the grounds that the Denver-San Diego market was not yet large enough to support both Continental and the incumbent, Western. The Board made clear, however, that the Denver-San Diego market offers a 'potential for future competition.' Order 72-12-29, p. 3. Continental filed its petition for reconsideration of Order 72-12-29 on January 29, 1973. The Board has not acted on that petition, and the case is still pending.

"If this route exchange is approved without an appropriate restriction, Frontier will be certificated for one-stop single-plane authority between San Diego and Denver via Phoenix. Frontier proposes two one-stop round trip flights plus a round trip two-stop flight (FL-5) and forecasts that it will capture 15% of a 125,215 passenger market or 18,782 passengers, leaving 106,433 passengers in 1974 (FL-105, p. 1). In the *San Diego* case, Judge Goldberg estimated the 1973 market at 127,409 passengers, but the Board reduced this estimate to 98,409

passengers and found that this level was insufficient at the time to support Continental and Western (CO-201).

"Even assuming that Frontier would stimulate the market by the 10% it has estimated, the remaining traffic would be only 6,000 passengers or slightly over eight per day each way above the level that the Board found was inadequate to justify a second nonstop carrier. However, the Board believed that Continental's entry as a second *nonstop* carrier would stimulate the market by only 10% thus Frontier's 10% stimulation estimate for one-stop service is overstated according to the Board's own theory. See Order 72-12-89, p. 9.

"Frontier has taken the position that a Denver-San Diego through-plane restriction would undercut the viability of its proposal in this case, thereby confirming the interrelationship between this case and the San Diego case (CO-SR-700, p. 1). Moreover, Frontier's witnesses made clear that the two cases are mutually exclusive as a matter of economic fact. Frontier's witness (Linkon) testified that the 'escape clause' in the agreement was included to permit Frontier to abandon the agreement if Continental were awarded Denver-San Diego authority (tr. 207). Mr. Linkon admitted that Frontier's proposal would be 'materially affected' either by Continental's certification in the Denver-San Diego market or by a Denver-San Diego through-plane restriction on Frontier (tr. 208-10). Frontier's chief economic witness (Coe) testified that if Continental were certificated on top of Frontier in the Denver-San Diego market, the result would be 'nearly-devastating' and that 'the ball game would be over for Frontier.' (tr. 447, 523). Mr. Coe concluded that 'it would be bad for all three carriers' in the Denver-San Diego market if both Continental and Frontier enter the market as they propose (tr. 449-50). He testified that San Diego-Denver traffic is 'essential to the viability of our [Frontier's] proposals' (tr. 521). Mr. Coe agreed that Continental's certifica-

tion in the *San Diego* case and the approval of the route exchange agreement would adversely affect traffic and revenues for both carriers not only in the Denver-San Diego market but in the Kansas City-San Diego and Colorado Springs-San Diego markets as well (tr. 449).[1]

"The fact that Continental is an applicant for non-stop San Diego-Denver authority in the *San Diego* case whereas Frontier would obtain one-stop San Diego-Denver authority from this exchange in no way lessens the mutual exclusivity of the two grants. Mr. Coe's testimony as well as the exhibits submitted by Frontier in this case make clear that the two matters are mutually exclusive as a matter of economic fact. Indeed, out of 5.9 million in total net passenger revenue forecast by Frontier in this case, $1.75 million or 30% comes from markets which Continental would serve if authorized in the *San Diego* case. Frontier estimates that it would carry a total of 26,555 passengers in these markets. (FL-105). That represents 24% of the traffic and 25% of the net passenger revenue forecast by Continental in the *San Diego* case (CO-300B; 401B, Docket 18104).

"The Board's decision in the *San Diego* case is predicated largely on what the Board believes would be the unsatisfactory economic results of adding Continental to the Denver-San Diego market in 1973. See Order 72-12-29, pp.8-12. If this exchange is approved and Frontier enters the Denver-San Diego market, Continental's opportunity for certification would be seriously jeopardized. Frontier undoubtedly would argue that Continental should not be certificated in the *San Diego* case in order to

[1] In the *San Diego* case, Continental proposed one-stop single-plane service in the Kansas City-San Diego market via Denver and one-stop on-line connecting service in the Colorado Springs-San Diego market (CO-106), Docket 18104). Frontier has proposed two-stop single-plane service in the Kansas City-San Diego market and on-line connecting service in the Colorado Springs market (FL-5).

protect the viability of Frontier's one-stop service. Indeed, that is the position Mr. Coe took on the record in this proceeding (tr. 448-40). The result would most certainly be the further delay of Continental's certification notwithstanding five years, two hearings, two Bureau recommendations and two favorable decisions by the Administrative Law Judge.

"The Board found that the San Diego-Denver market offers a 'potential for future certification of competition.' Order 72-12-29, p. 3. It did not dispute the Law Judge's finding that Continental's selection would best meet the public convenience and necessity. However, by approving this exchange without an appropriate restriction on Frontier's Denver-San Diego authority, the Board would delay, and probably eradicate, Continental's opportunity to provide that competition as recommended by the Administrative Law Judge.[1] This is a clear violation of the *Ashbacker* doctrine. *Delta Air Lines, Inc. v. CAB*, 175 [sic] F.2d 632 (D.C. Cir. 1959), cert. denied, 362 U.S. 969 (1960).

"It must be emphasized that Frontier's principal argument in this case is the economic benefit to it of the route exchange. The San Diego-Denver market is a critical factor in the economic viability of Frontier's proposal and hence is the *sine qua non* of Frontier's case. The Court's opinion in the *Delta* case made clear that the Board cannot effectively deny an application in a pending case by granting a mutually exclusive award in another proceeding, particularly where the entire basis

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[1] Once Frontier gains access to the market and Continental's certification is further delayed, Frontier would contend historic participation in the market and threat of diversion as carrier selection factors in its favor. These factors would come into existence *only if* this route exchange is approved without a restriction on the carriage of San Diego-Denver traffic.

for the award is service over the *same* route sought by the other applicant."

* * * * *

So the Court may more readily understand the import of the foregoing quotation, Delta respectfully submits the following factual summary:

1. Continental is seeking Denver-San Diego non-stop authority in the *San Diego* case, CAB Docket No. 18104, a market now served by Western Air Lines.

2. The Board has denied Continental's request for competitive authority in the Denver-San Diego market on the grounds that the market is not large enough to support both Western and Continental.

3. Continental has sought reconsideration of the Board's opinion, which reconsideration has been pending for more than a year.

4. In the *American/Frontier*, case there exists the possibility of certification of Frontier between Phoenix and San Diego. Since Frontier holds pre-existing authority between Denver and Phoenix, certification of Frontier between Phoenix and San Diego would allow Frontier to operate between Denver and San Diego with one stop at Phoenix.

5. Continental claims mutual exclusivity under the *Ashbacker* doctrine[1] in that certification of Frontier between Phoenix and San Diego—without a restriction which would preclude single-plane service between Denver and San Diego via Phoenix—would be mutually exclusive as a matter of economic fact with Continental's pending application for Denver-San Diego nonstop authority.

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[1] Relying on Delta v. C.A.B., 275 F.2d 632 (Second Delta).

6. As a point of comparison, Continental holds pre-existing authority between Houston and Phoenix/Albuquerque/El Paso/San Antonio. It has been Delta's contention throughout the case for which a writ of certiorari is hereby sought, that the certification of Continental between Houston and Miami—without a restriction to preclude single-plane service between the excluded area points of Phoenix, Albuquerque, El Paso and San Antonio, on the one hand, and Miami, on the other, via a stop at Houston—would be mutually exclusive as a matter of economic fact with Delta's excluded application for authority between the excluded area points and Miami.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

Nos. 73-1377, 73-1387, 73-1391, 73-1414, 73-1449, 73-1498

[Filed Nov. 20, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

DELTA AIR LINES, INC., *et al.*, PETITIONER

v.

CIVIL AERONAUTICS BOARD, *et al.*, RESPONDENT

CONTINENTAL AIR LINES, INC.; THE CITY OF EL PASO, THE EL PASO AIRPORT BOARD & THE EL PASO CHAMBER OF COMMERCE; TUCSON AIRPORT AUTHORITY; THE CITY OF PHOENIX, ARIZONA AND THE PHOENIX CHAMBER OF COMMERCE; THE CITIES OF HOUSTON, TEXAS AND THE HOUSTON CHAMBER OF COMMERCE; THE CITIES AND CHAMBERS OF COMMERCE OF MIDLAND AND ODESSA, TEXAS; THE CITY OF SAN ANTONIO & THE GREATER SAN ANTONIO CHAMBER OF COMMERCE; NATIONAL AIRLINES, INC., INTERVENORS

Before: Bazelon, Chief Judge; and Leventhal and Robinson, Circuit Judges

ORDER

On consideration of the petition of Delta Air Lines, Inc., for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam
For the Court:

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

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No. 73-1274

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1973

Delta Air Lines, Inc.,
Petitioner

v.

Civil Aeronautics Board, et al.,
Respondents

BRIEF OPPOSING PETITION FOR CERTIORARI

Submitted by

CITY OF SAN ANTONIO
and
GREATER SAN ANTONIO CHAMBER OF COMMERCE

STATEMENT

The City of San Antonio and the Greater San Antonio Chamber of Commerce have long been working for improvements in air service and intervened in the proceeding before the Civil Aeronautics Board (Board)

because the proceeding could result in better service between Miami and San Antonio.

There is no airline route from San Antonio to Miami, although Eastern Air Lines has a route from San Antonio to New Orleans and another route from New Orleans to Miami. Eastern can provide service between San Antonio and Miami by stopping at New Orleans. It provides one such flight per day in each direction which is insufficient and inadequate.

The proceeding before the Board included the establishment of a new route between Houston and Miami. Continental Air Lines (Continental) has a San Antonio-Houston route. If it were awarded the route between Houston and Miami, it could provide better service between San Antonio and Miami via Houston. Consequently, San Antonio intervened in the proceeding before the Board and submitted evidence and testimony in support of an award to Continental.

The Board awarded the route to Continental, thereby improving San Antonio's air service.[1/] San Antonio also inter-

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1/ In contrast to Eastern's one round trip via New Orleans, Continental provides 2 1/2 round trips via Houston.

vened in and participated in the case before the Court of Appeals, urging affirmance of the Board's decision.

ARGUMENT

Delta Air Lines, the petitioner, lost its case before the Board and Court of Appeals on the merits. It is now contending that it was deprived of rights to which it was entitled under the so-called Ashbacker[2/] doctrine. Nothing presented by petitioner is new or novel, and there is no need for this court to review the decision of the court below. Petitioner argues that because the Board once had a Southern Transcontinental case, the Board could not reexamine the need for service in southern cities without having another Southern Transcontinental case. Petitioner is, in effect, claiming that it, rather than the Board, should determine the scope of proceedings before the Board. Here the Board heard the needs of communities for air service in separate proceedings rather than a consolidated one. For example, it looked at Albuquerque and decided to consider the need for service in five separate markets, in-

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2/ Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945).

cluding Chicago which by no stretch of the imagination can be considered a southern point. It also decided to consider the needs of Memphis for service in a different proceeding. Neither Memphis nor the State of Tennessee was included in the Southern Transcontinental Services Case, 33 C.A.B. 701 (1961).

Petitioner's argument is to the effect that the Board may not consider the needs of one discrete market without considering the needs of all other markets in the same or companion cases. Acceptance of such an argument would strait-jacket the Board and restrict its ability to deal with communities which have different needs for new and additional air transportation services at different times. This was made plain in an earlier appeal in this very case. National Air Lines, Inc., v. C.A.B., 392 F.2d 504 (D.C. Cir. 1968).

The public interest is the paramount interest. The Board structures its proceedings to insure an efficient, reliable, and adequate air transportation service to meet the needs of the public convenience and necessity. This point is not considered by the petition for a writ of certiorari which is based solely on procedural matters relating to the Ashbacker doctrine.

The decision below deals adequately with the application of the Ashbacker

doctrine to Civil Aeronautics Board proceedings. The doctrine has been used as a defensive maneuver by the air carriers in their competition for new route awards and in some cases has resulted in unduly lengthy proceedings.

While an air carrier has the right to file for the same route that another carrier applies for, an air carrier does not have the right to extend the route. Thus, if a carrier applies for a Houston-Miami route, an application for an Albuquerque-Miami route via Houston need not be consolidated for hearing and decision.

Petitioner contends that "when the Board commences a new route case sua sponte, as it did here, and itself selects specific route segments . . . the right of airlines to submit responsive applications is absolutely vital to a fair hearing . . ." (p. 17). The point is, however, that petitioner did not submit just a "responsive" application; its proposal went far beyond the scope of the proceeding. Petitioner misconceived the scope of the proceeding, but its misconception in this respect does not constitute any denial of due process.

The major cases on the facts here presented are Eastern Air Lines v. C.A.B.,

178 F.2d 726 (D.C. Cir. 1949) and Frontier Airlines, Inc. v. C.A.B., 349 F.2d 587 (10th Cir. 1965).

In the Eastern case, the District of Columbia Court of Appeals held that an application for service not confined to either the type of service or to the area under consideration did not require a consolidation of the application. In the Frontier case, the Tenth Circuit Court held that applications beyond the specified area of a proceeding need not be consolidated.

Petitioner is claiming that it should be heard on its application to provide service to points beyond the area under investigation. In the Frontier case, the court said,

> "But to extend such argument to ultimate conclusion would require the Board to equalize as far as possible all inherent advantage between applicants before a general investigation could go forward. The complexity of such procedure would destroy its worth and result in a hopeless administrative jumble." 349 F.2d at 591."

Petitioner argues that Delta Air Lines, Inc. v. C.A.B., 275 F.2d 632 (D.C. Cir. 1959), Cert. Den. 362 U.S. 969, is a

pertinent case and was overruled sub silentio by the court below. While petitioner may seek solace in that decision, the fact is that the decision is simply not relevant to the instant proceeding. That decision was concerned with the Board's using a limited area case to make a transcontinental award without appropriate restriction. Here, the Board has made appropriate restriction in a limited area case and specifically refused to make a transcontinental award. In view of the dissimilarity of the cases, citation to the Delta case is wholly unnecessary.

The Board proceeding has been monitored carefully by the court below. It reviewed the order fixing the scope of the case. National Airlines, Inc., v. C.A.B., 392 F.2d 504 (D.C. Cir. 1968). It reviewed the first decision of the Board. Continental Air Lines, Inc. v. C.A.B., 443 F.2d 745 (D.C. Cir. 1971). And, the instant proceeding is the result of a review of the Board's second decision.

Understandably, petitioner is unhappy with the decision. However, petitioner has not demonstrated any conflict in decisions applying the Ashbacker doctrine to Board proceedings. The result reached by the court below was compelled on the basis of a well-developed body of case

law dealing with Ashbacker and the Civil Aeronautics Board.

CONCLUSION

The relevant cases are clear and were properly applied to the facts of this case. There is no need for this Court to grant a writ of certiorari.

Respectfully submitted,

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March 21, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1274

DELTA AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD,
CONTINENTAL AIR LINES, INC., ET AL., *Respondents*

BRIEF FOR RESPONDENT CONTINENTAL AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Continental Air Lines, Inc. ("Continental") submits this brief in opposition to the petition of Delta Air Lines, Inc. ("Delta") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit for review of that court's decision and judgment in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* Case No. 73-1377, entered on October 23, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which Delta seeks, issued in the third case in which that court has heard Delta's *Ashbacker* argument in connection with the route here at issue.

In *National Airlines, Inc.* v. *CAB,* 129 U.S. App. D.C. 180, 392 F.2d 504 (1968), the court dismissed Delta's appeal which sought review of the Board's decision declining to expand the proceeding to include numerous secondary markets.

In *Continental Air Lines, Inc.* v. *CAB,* 143 U.S. App. D.C. 330, 443 F.2d 745 (1971), the court set aside the Board's award of the Houston-Miami route to Delta and remanded the case for further consideration.

No party sought review by this Court of either of the prior decisions of the Court of Appeals in this proceeding.

QUESTION PRESENTED

This case does not present the question of whether the right to a fair comparative hearing, mandated in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327 (1945), applies in airline route cases.

This case presents the narrower question as to whether the Board's award to Continental of a new route between Houston and Miami, denied to Delta a fair comparative hearing, where—(1) the proceeding was limited to consideration of competitive service between specified pairs of cities; (2) comparative hearing was afforded to all competing applicants for the route here at issue; (3) the Board's "choice of Continental for a Houston-Miami award is predicated primarily on the fact that it will bring greater service benefits than any other applicant to the primary market and offer superior beyond-area advantages as well"; and (4) Delta was afforded an opportunity in the hearing to show that an award to Continental and the grant of its excluded application for other routes were mutually exclusive economically, and failed to do so.

STATEMENT

A concise statement of the case, containing the facts material to the consideration of the questions raised by Delta, is contained in Part II of the opinion of the Court of Appeals. Appendix A, pp. 6-13.[1] The statement of the case offered by petitioner is misleading in a number of respects which will be discussed in the argument. For the convenience of the Court, Continental will here set out a brief summary of the history of this proceeding.

This case arose out of a Civil Aeronautics Board route proceeding begun in 1967, involving the need for additional nonstop service in 18 major markets lying across the southern portion of the United States. *Southern Tier Competitive Nonstop Investigation,* Docket 18257.

Delta and National Air Lines, Inc. (National), the incumbent monopolists in most of these markets, moved to expand the proceeding to include numerous secondary markets. The Board refused to do so, holding that such an expansion would unduly complicate the proceeding. The carriers appealed the Board's decision to the United States Court of Appeals for the District of Columbia, claiming a denial of the right to a comparative hearing mandated in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327 (1945). The court dismissed the appeal for lack of jurisdiction, observing, however, that the *Ashbacker* claim appeared to be without substance. *National Airlines, Inc.* v. *CAB,* 129 U.S. App. D.C. 180, 186, 392 F.2d 504, 510 (1968).

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[1] "Appendix" refers to the Appendix to Petition for Writ of Certiorari submitted in a separate accompanying volume by petitioner. "J.A." and "S.J.A." refer to the Joint Appendix and Supplemental Joint Appendix filed in the Court of Appeals.

After a full administrative hearing, Chief Administrative Judge Wiser selected Continental to compete with National in the Houston-Miami market, based on his finding that Continental "can give the best public service in the market." Initial Decision, February 28, 1969, p. 53; S.J.A. 83. He rejected Delta's *Ashbacker* argument. *Id.* at 58-61; S.J.A. 88-91.

The Board, however, selected Delta based on "considerations of the overall balance of awards" in this and other markets. Order 69-7-135, July 24, 1969, p. 45; S.J.A. 214.

Continental sought review by the Court of Appeals for the District of Columbia Circuit. On February 12, 1971, that court set aside the award to Delta and remanded the case to the Board for consideration of "the balance of the factors bearing directly upon the route in issue", pointing out the Board's failure to fully consider the superior public benefits which would result from Continental's selection. *Continental Air Lines, Inc.* v. *CAB,* 143 U.S. App. D.C. 330, 343, 443 F.2d 745, 758 (1971).

On March 5, 1971, the Board vacated Delta's award but granted Delta temporary authority by exemption to continue operating "until sixty days after final determination by the Board of this remanded proceeding." Order 71-3-34, p. 7; S.J.A. 461.

After a full rehearing, Administrative Law Judge Dapper selected Continental, considering all of the factors bearing directly on the route in issue and finding that Continental would provide the greatest public benefits in terms of greater frequency of service in the Houston-Miami market, lower fares to Houston-Miami travellers, and new single-plane service between Miami

and points west of Houston. Initial Decision, July 21, 1972, pp. 20-58; S.J.A. 498-536. Judge Dapper rejected Delta's *Ashbacker* argument because Delta failed to make a factual showing that an award to Continental and the authority sought in Delta's excluded application were mutually exclusive. *Id.* at 63-65; S.J.A. 541-43.

The Board affirmed Judge Dapper's selection of Continental, agreeing that its selection would provide the greatest public service benefits. Order 73-2-89, February 23, 1973; S.J.A. 560. The Board also considered and rejected Delta's *Ashbacker* argument. *Id.* at pp. 13-16; S.J.A. 573-76.

Delta sought reconsideration based on its *Ashbacker* argument, which the Board again considered and rejected. Order 73-5-22, May 4, 1973, pp. 2-10; S.J.A. 688-96.[2]

Delta and other disappointed applicants then sought a stay of the Board's order, which was to become effective on April 24, 1973, pending its appeal to the United States Court of Appeals for the District of Columbia Circuit. The Board denied this request. Order 73-4-24, April 4, 1973; S.J.A. 654.

Delta and these other carriers next sought a stay from the Court of Appeals. That court on April 25, 1973, granted a stay, but without opinion. As a result of the stay, the Board extended Delta's exemption authority "until the United States Court of Appeals for the Dis-

[2] In doing so, the Board stated that it selected Continental because it would provide "a greater volume of service in the primary market, a broader range of services, and more first single-plane and overall single-carrier benefits in beyond-markets. These factors were material." Order 73-5-22, p. 11; S.J.A. 697.

trict of Columbia Circuit issues its mandate on the merits." Order 73-7-106, July 23, 1973.

On October 23, 1973, the court issued its opinion, unanimously denying the petitions for review and affirming the Board's order. On November 6, 1973, Delta petitioned for rehearing and suggested a rehearing in banc, based upon its *Ashbacker* contention. On November 20, 1973, the court denied Delta's petition, noting as to suggestion for rehearing in banc that "no Judge has requested a vote thereon."

On November 21, 1973, Delta sought a stay of the court's mandate for a period of thirty (30) days pending the filing of a petition for writ of certiorari based solely on its *Ashbacker* argument. Continental and the Government opposed grant of this stay.

On December 7, 1973, the court denied Delta's motion, but withheld issuance of its mandate until December 14, 1973, to give Delta time to seek a stay from the Supreme Court.

Delta's application to this Court for a stay of the mandate of the Court of Appeals was filed on December 10, 1973, presented to Mr. Chief Justice Burger, and denied on December 13, 1973.

On December 13, 1973, the Board extended Delta's exemption through January 31, 1974. Order 73-12-55. On February 1, 1974, Delta terminated its two daily round-trip flights with DC-9 aircraft, and Continental commenced service between Houston and Miami with three daily flights in each direction with larger Boeing 720-B aircraft (with a fourth round-trip flight to be added as soon as fuel supplies permit), and introduced the lower Economy Fare for the first time in the Houston-Miami market.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There are no special or important reasons for this Court to review the instant case on writ of certiorari and the writ should not be granted. The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter, nor has the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

The petitioner appears to infer that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court by suggesting that the first question presented is whether the *Ashbacker* doctrine of fair comparative hearing is applicable to airline route cases (Petition, p. 2), and that the decision of the Court of Appeals "has cast serious doubt on the validity and applicability of that doctrine to airline cases" (Petition, p. 12).

It is of course well settled that the applicant for an airline route is as much entitled to a fair comparative hearing on his application as is an applicant for a communications license. *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 184 F.2d 545 (9th Cir. 1950); *Northwest Airlines, Inc.* v. *Civil Aeronautics Board,* 90 U.S. App. D.C. 158, 194 F.2d 339 (1952); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 97 U.S. App. D.C. 46, 228 F.2d 17 (1955); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 100 U.S. App. D.C. 184, 243 F.2d 607 (1957); *Frontier Airlines, Inc.* v. *Civil Aeronautics Board,* 104 U.S. App. D.C. 78, 259 F.2d 808 (1958); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 107 U.S. App. D.C. 174, 275 F.2d 632 (1959), *cert. denied,* 362 U.S. 969 (1960) (*"Second Delta"*); *National Airlines, Inc.* v. *Civil Aeronautics Board,* 129

U.S. App. D.C. 180, 392 F.2d 504 (1968). There is no reason for this Court to "assess" the "current vitality" of the *Ashbacker* doctrine (Petition, p. 12), because there is no doubt as to its validity.

The only offense which Delta asserts was committed by the Court of Appeals is that the Court failed "to reconcile or even cite the leading decision in which *Ashbacker* rights were held violated . . ."—i.e., its own earlier decision in *Second Delta.* Petition, p. 12. What the court below did instead was to cite the precedents applicable to the factual situation here presented, *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board, supra,* and its prior decision in this same proceeding, *National Airlines, Inc.* v. *Civil Aeronautics Board, supra.* The court did not again distinguish *Second Delta* from the case at bar because it already had done so in its decision in *National.* The court's refusal to belabor inapplicable precedents is hardly ground for certiorari.

Petitioner also suggests as a reason for the grant of a writ that the court below has sanctioned certain administrative procedures of the Civil Aeronautics Board, e.g., the Board's practice to "initiate new route proceedings *sua sponte* and [predetermine] . . . what routes may be contended for therein" (Petition, p. 12), or dismiss applications as stale (Petition, p. 18). To the extent that the first issue was raised below, it was not raised in the instant case but in *National Airlines, Inc.* v. *Civil Aeronautics Board, supra,* in 1971, and no review sought in this Court. The second issue is raised by Delta for the first time in its petition and has no real relevance in any event, since in the hearing Delta was permitted to offer evidence on the issue of mutual exclusivity even though it had no application pending.

In short, there is no reason for the Court to review the proper application of a well established rule of law to the facts in this particular route case.

ARGUMENT

I. There Was a Sound Basis for Continental's Selection for the Houston-Miami Route.

All that has happened in this case is that the Board has awarded the Houston-Miami route to the carrier whose selection insures the greatest benefits to the public. Setting aside Delta's rigmarole about pairs of points, pieces of applications, and "area considerations"—what both the administrative law judges and finally the Board did in this case was to consider each applicant in terms of traditional carrier-selection factors, and choose the carrier who would provide the greatest frequency of nonstop flights in the primary market, the lowest fares, and the best connecting service to cities west of Houston.

There has never been any doubt that Continental's selection for this route would result in the greatest public benefits, not just because Continental is an aggressive competitor, which it is, or an advocate of lower fares, which it is, but because its route structure permits it to offer the greatest frequency of service in the market at issue. Following the original hearing, the Administrative Law Judge found that the principal deficiency in the Houston-Miami market was the lack of nonstop service, with the incumbent carrier, National, providing only a single daily nonstop flight in one direction and serving the market principally with one-stop and multi-stop service. Initial Decision, February 28, 1969, p. 29; S.J.A. 22. He selected Con-

tinental based on the fact that it "can give the best public service in this market." *Id.* at 53; S.J.A. 83.

The Board agreed with Judge Wiser that National "has not been diligent in developing the service in this market," having provided "too little nonstop service." Order 69-7-135, July 24, 1969, p. 43; S.J.A. 212. However, the Board selected Delta based on the conclusory statement that "the balance of other factors [between Continental and Delta] in the Houston-Miami market are quite close," and the route should be awarded to Delta on the basis of "considerations of the overall balance of awards. . . ." *Id.* at 45; S.J.A. 214.

After seeking and being denied reconsideration by the Board, Continental sought review by the Court of Appeals for the District of Columbia Circuit of both the Houston-Miami and Dallas-Phoenix awards to Delta. The Houston-Miami and Dallas-Phoenix markets were virtually identical. Both markets were about the same distance and size. Both were served by monopolists which provided insufficient nonstop service. In Houston-Miami, Continental was able to provide the highest level of nonstop service and new single-carrier service between Miami and points west of Houston. Continental did not serve Miami; Delta served both cities. In Dallas-Phoenix, Delta was able to provide the highest level of nonstop service and new single-carrier service between Phoenix and points east of Dallas. Delta did not serve Phoenix; Continental served both cities. The Board, however, selected Delta for both markets, without explanation of the obvious inconsistency.

On February 12, 1971, the Court of Appeals upheld the Board's decision awarding the Dallas-Phoenix route to Delta on the basis of its ability to provide the

greatest frequency of service in the market at issue and new single-carrier service between Phoenix and cities beyond Dallas. The court set aside the Board's order awarding the Houston-Miami route to Delta, and remanded that part of the case to the Board to consider "the balance of factors bearing directly upon the route in issue." *Continental Air Lines, Inc.* v. *Civil Aeronautics Board,* 143 U.S. App. D.C. 330, 343, 443 F.2d 745, 758 (1971). While the court was critical of several aspects of the Board's decision, including the inconsistent manner in which the two awards had been made, it recited the fare and service benefits which would result from Continental's selection and observed, "Had all or some of these been expressly dealt with, it is at least possible that the Board might not have found the balance between Continental and Delta to be so closely struck." 143 U.S. App. D.C. at 342, 443 F.2d at 757.

In remanding the case, the court gave the Board the choice of proceeding "with or without the taking of further evidence." The Board elected to order a full rehearing of the Houston-Miami case. Order 71-11-17, p. 2; S.J.A. 464. After a full rehearing, Administrative Law Judge Dapper again found a need for competitive service in the market, based on its size, growth rate, and the inadequate level of National's nonstop service, even with the limited spur of Delta's competition which the Board permitted it to continue to provide under an exemption. Initial Decision, July 21, 1972, pp. 17-20; S.J.A. 495-98.[3] Following the mandate of the Court of Appeals to consider "the balance of

[3] Judge Dapper's Initial Decision on rehearing is hereafter cited as "I.D."

factors bearing directly upon the route at issue," Judge Dapper analyzed the proposals and arguments of each applicant with respect to each of the ten carrier-selection factors. I.D., pp. 20-57; S.J.A. 498-535.[4] He concluded:

> "The selection of carrier factors, viewed in the aggregate, clearly favor Continental. That carrier has a distinct and significant advantage in terms of beyond-area benefits, frequencies to be operated over the segment, and the proposed economy fare. The only factors which militate against Continental's selection are its lack of identity in Miami and the diversion from other carriers which its proposal will cause. These negative considerations have been revealed on analysis herein to be of lesser significance than the compelling factors favoring Continental's selection." I.D., p. 58; S.J.A. 536.

The Board elected to review Judge Dapper's decision, *sua sponte*. After receiving briefs and hearing oral argument, the Board adopted Judge Dapper's Initial Decision, stating at the outset of its opinion, "we adopt his findings and conclusions as our own." Order 73-2-89, p. 1; S.J.A. 561; Appendix C, p. 25. The Board, like Judge Dapper, found that competitive service was required "to afford Houston-Miami passengers a complete, well balanced pattern of nonstop

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[4] Specifically, he considered: (1) route integration as evidenced by the ability to convenience beyond-segment traffic; (2) frequencies to be operated over the segment in issue; (3) type of equipment and in-flight services; (4) fares; (5) identity at the Houston and Miami stations; (6) historic participation in the traffic; (7) efforts to develop and promote the market in question; (8) route strengthening; (9) diversion from other carriers; and (10) profitability of the route.

schedules. . . ." *Id.* at 3; S.J.A. 563; Appendix C, p. 26. The Board affirmed Judge Dapper's selection of Continental, noting that its choice, "like Judge Dapper's, turns on the traditional carrier selection factors directly applicable to the market at issue . . . ." *Id.* at 7; S.J.A. 567; Appendix C, p. 30. The Board summarized the basis for its decision as follows:

> "Our choice of Continental for a Houston-Miami award is predicated primarily on the fact that it will bring greater service benefits than any other applicant to the primary market and offer superior beyond area advantages as well. At the same time, we believe that Continental's proposal will not seriously harm any other carrier." *Id.* at 5; S.J.A. 565; Appendix C, p. 28.

II. The Fallacy of Delta's Ashbacker Argument.

Delta's *Ashbacker* argument is based on an effort to equate the Board's action in the present case with that condemned by the court in Part I of *Second Delta.* In that case the court held the *Ashbacker* rule to be violated when the Board chose TWA for a route between St. Louis and the Southeast *solely* for the reason that the award would enable TWA to provide transcontinental service between Florida and California, at a time when the California-Florida route was the subject of a pending investigation. The court stated: "The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast." 107 U.S. App. D.C. at 178, 275 F.2d at 636. The court concluded that the Board "cannot hear an area case and, without more, make a transcontinental award,"

and "thus ignore pending applications for a transcontinental route certificate, if those applications are mutually exclusive. . . ." 107 U.S. App. D.C. at 181, 275 F.2d at 639.

In its effort to find in this case the "mirror image" of *Second Delta*,[5] Delta's brief in the Court of Appeals repeatedly asserted that Continental's selection by Judge Dapper and the Board was based *solely* on beyond-area service benefits. See, e.g., Delta's brief to the Court of Appeals, pp. 18, 21, 32, 34. As documented in the preceding section of this argument, Delta's contention is an obvious distortion of the decision of the Board and its administrative law judge.

Having urged that the court heed a precedent which is obviously inapplicable to the present case, Delta asserts that the court's failure to discuss *Second Delta* "amounted to a *sub silentio* overruling thereof." Petition, p. 12. This assertion is absurd. The court made clear that the two cases were not parallel. The court stated, "In sum, Delta's *Ashbacker* claim rests on the fallacy that Continental was selected for its ability to serve the needs of the excluded cities whereas it was actually selected upon evaluation of the Houston-Miami market, its need for service, and the kind of service in that market proffered by Continental, including the service made possible by Continental's backup support . . . ." Appendix A, p. 13.

In its present petition, Delta apparently abandons its prior effort to convince the reviewing courts that Continental was selected solely on the basis of the benefits it could provide to cities beyond Houston, and

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[5] Delta's brief in the Court of Appeals, p. 31.

now appears to argue that any reference to or reliance upon beyond-area benefits fatally poisons the Board's decision. Such a rule would obviously affront the basic public-interest standards of the Act. Fortunately such a rule has never been declared in *Second Delta* or in any other court decision.

The Board clearly is not prohibited from considering beyond-segment traffic benefits in selecting a carrier to serve a route. As the Court of Appeals observed in *Frontier Airlines, Inc.* v. *CAB,* 104 U.S. App. D.C. 78, 80, 259 F.2d 808, 810 (1958), "Without elaborating these contentions it is sufficient to say that we think the needs of beyond-area traffic may in many factual situations be a proper concern in the problems of establishing new air routes. In many situations we do not see how it could be otherwise."

Subsequently, in *Second Delta,* the very case on which Delta relies, the court observed that consideration of beyond-area traffic, to the extent that such traffic support enables the carrier to mount a higher level of service within the primary market at issue, is quite different from basing an award solely on the needs of the beyond-segment traffic. Specifically, the court stated: "[Beyond-area] traffic is certainly pertinent to the selection of a carrier to perform intra-area services found necessary because of service deficiencies within the area; such traffic may well, as the Board found, be used to provide the base for proper traffic development within the area." 107 U.S. App. D.C. at 184, 275 F.2d at 642.

In sum, the Board is not precluded from considering any aspect of the public interest in selecting a carrier to serve a particular route. In this case the court thus

applied these established principles to the facts before it. It stated:

> "It is true that the Board did give consideration to traffic generated at the excluded points when it came to measure the quantity of traffic between Houston and Miami—for the purpose of appraising the feasibility and realism in Continental's proffer as to Houston-Miami service, and of appraising the quantity and quality of the Houston-Miami service proposed by Continental. But the focus was on the Houston-Miami segment, even though the CAB traditionally views proposals for any particular segment not with tunnel vision but rather with a peripheral vision that takes into account the support (or diversion) ascribable to nearby service." Appendix A, pp. 12-13.

III. No Fundamental Issues of Administrative Law Are Presented by This Case.

In its petition to this Court, Delta for the first time asserts a newly discovered, and somewhat obscure, basis for review of the Board's decision. It suggests that some fundamental issue of administrative law is raised by the combined effect of (1) the Board commencing a new route case *sua sponte* and selecting specific route segments to be included, (2) the court's comments on "defensive" route applications, and (3) the Board's practice of dismissing stale applications. We will attempt to sort out Delta's confused claim of conglomerate error.

Delta does not appear to question the authority of the Board to commence a new route case *sua sponte,* rather than in response to an application, and to select the specific route segments to be considered. Instead, Delta asserts that when the Board does so "the right of airlines to submit responsive applications is absolutely

vital to a fair hearing and to the administration of the Federal Aviation Act." Petition, p. 17. Delta further observes that this is a point "to which the court did not address itself." *Id.* The court did not address itself to this matter because it was not raised in the instant case, and because "the right of airlines to submit responsive applications" has never been questioned. When a route proceeding is instituted by the Board, every carrier has a right to file applications for the routes at issue, as any number of carriers including Delta did in the instant case.

Moreover, the Board has uniformly received, as it did in this case, the comments of potential carrier applicants as to the proper scope of the proceeding, the routes to be included, and the restrictions to be imposed on any certificates granted as a result of the proceeding. What both the Board and the courts have denied is the right of a carrier, by a *non-responsive* application for routes which the Board determines should *not* be included, to force enlargement of the proceeding beyond manageable bounds. To the latter question both the Board and the court addressed themselves.

This was the basic issue considered by the court in *National Airlines* v. *CAB,* 129 U.S. App. D.C. 180, 392 F.2d 504 (1968), when Delta and National sought to expand the proceeding to permit them to apply for a number of additional smaller markets from which other applicants might derive backup traffic to support service in the monopoly markets of Delta and National. The court dismissed the appeal and stated:

> "Petitioners claim that the exclusion of San Antonio, Tucson and El Paso from any of the scheduled proceedings deprives them of *Ashbacker* rights because petitioners have applied for trans-

continental routes with intermediate stops at these excluded cities. American Airlines, for example, presently serves these excluded cities on routes extending from Houston and Dallas to the West Coast. By acquiring Miami-Houston and Dallas authority in Southern Tier, American would have a transcontinental route that would, say petitioners, economically exclude the applications petitioners have filed for similar authority.

"We think this situation is analogous to that in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board* [100 U.S. App. D.C. 184, 243 F.2d 607 (1957)]. There Northwest applied for Detroit-Miami rights which Eastern already had, and the Board scheduled this service for investigation. Eastern sought expansion of this hearing to include its application for Detroit-West Coast rights already held by Northwest. Eastern contended that this was required by *Ashbacker* since a grant to Northwest would *de facto* give it West Coast-Detroit-Miami rights, and that if Eastern were not then given an opportunity to attain the same transcontinental route by completing its missing segment, it could not as an economic matter justify a second carrier on that route. We held that Eastern could not, in the name of *Ashbacker,* extend a geographically limited investigation 'into a massive consideration of the whole of American air transportation.' [*Id.* at 186, 243 F.2d at 609]." 129 U.S. App. D.C. at 186, 392 F.2d at 510.

The court in *National* also observed: "Pre-existing route intricacies render it almost impossible for the Board to tailor its proceedings so as to equalize the advantages, and disadvantages, with which each applicant enters a comparative proceeding." 129 U.S. App. D.C. at 184, 392 F.2d at 508.

Both the foregoing comments by the court in *National* were quoted with approval by the court in the instant case, the court observing that, "It bears reiteration that the Board is not obliged to structure its proceedings so as to equalize the beyond market capabilities of all applicants to a route case." Appendix A, p. 10.

It was in this context that the Board first referred to "a defensive application." The Board's comment was as follows:

> "In addition, both the Board and the courts have long recognized that we are not obliged to tailor our proceedings so as to equalize the beyond-area capabilities of all applicants to a route case. While Delta does not dispute this settled doctrine its position here would undermine the principle and thereby endanger the Board's ability to control the scope of its own proceedings. Thus, in any case where one applicant possessed a significant route integration advantage permitting it to claim substantial beyond benefits, a competing carrier could simply file a defensive application for nonstop rights in the same beyond markets. The Board would then be forced to choose between a massive expansion of the scope of a proceeding, or if it chose not to expand it, to eliminate route integration and beyond benefits as a factor in its decision. The elimination of such back-up support traffic would also reduce the level of service possible in the primary markets at issue. We do not believe that such an interpretation of the *Ashbacker* doctrine is warranted." Order 73-2-89, February 23, 1973, pp. 15-16; S.J.A. 575-76; Appendix C, pp. 36-37.

The court in its opinion used "defensive route applications" in the same context. The court stated:

> "As already noted, pre-existing certificates do give an advantage to certain applicants for a new seg-

ment, but that is not inherently unfair. Nor can we open the door to an equalization approach that would encourage all kinds of defensive route applications. The Board must act realistically in terms of existing route identification and business patterns." Appendix A, p. 13.

The *Eastern* precedent is clearly applicable to the case at bar. In this case, Delta used three multi-stop transcontinental applications to blanket not only all of the routes at issue in the original *Southern Tier* case but also most of the cities served by other applicants in the proceeding.[6] Grant of any one of these applications would involve the creation of new route authority throughout Delta's entire system, which at that time embraced the Northeast to Florida and beyond Florida through the Southeast and Southwest to California. The only area of the country untouched by Delta's applications was the Northwest. Thus, inclusion of Delta's applications would have substantially expanded the proceeding.

In the remanded phase of this case, Delta sought to compare pieces of its excluded application with portions of Continental's routes west of Houston to support its *Ashbacker* claim.[7] Since Delta's original ap-

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[6] Delta filed three applications which it sought to have consolidated with the *Southern Tier* Case: Docket 18250, which added Phoenix to Delta's Route 24 stretching from New York throughout the Southeast and beyond to California; Docket 18253, which involved a new route from San Francisco and Los Angeles to Miami via Phoenix, Albuquerque, El Paso, Dallas, Huntsville, Atlanta and Tampa; and Docket 18348, which involved a new route from San Francisco and Los Angeles via Tampa, New Orleans, Houston, San Antonio, Dallas, Albuquerque, El Paso and Phoenix. See Petition of Delta Air Lines, Inc. For Stay of an Order of the Civil Aeronautics Board, No. 21374, November 6, 1967, pp. 7-8.

[7] See chart following p. 16 of Delta's Brief to the Court of Appeals, June 11, 1973.

plications were so broad in scope, Delta was able to select those pieces of its unrestricted applications which matched Continental's route structure and to advance an *Ashbacker* claim with respect to each piece. Delta's brief to the Court of Appeals, pp. 16-17. However, the court had already dealt with this kind of argument. In *Second Delta,* the court held that Eastern was not entitled to contemporaneous consideration of pieces of its application which it had alleged were identical to the route authority at issue:

> ". . . Eastern splits its unrestricted application into small sections and urges that the several sections must be compared with similarly segregated sections of other applications. We think the Board is not required to do this. Were the law otherwise, the Board would be burdened with a flood of applications and motions, . . . filed by airlines whenever a new route was proposed which served any point already served by the protesting line. Such a tangle would prevent the Board from performing its statutory duty of upholding the public interest by fostering a sound air transportation system." 107 U.S. App. D.C. at 187, 275 F.2d at 645.

If Delta's *Ashbacker* argument were to be accepted, either every case would be converted into a massive reconsideration of the U.S. air transportation system or the Board could not consider the benefits of beyond-segment traffic support in meeting the needs of the market at issue and providing added public service benefits. Either result would be a serious impairment of the Board's ability to protect the public interest.

Finally we turn to Delta's inference, raised for the first time in its petition, that its rights have been abridged by the Board's practice of dismissing stale

applications (Section 302.911 of the Board's Rules of Practice, 14 C.F.R. § 302.911), and the fact that Delta's "excluded applications" had been dismissed by the Board here.

Delta does not point out to the Court that subsection (c) of Section 302.911 provides as follows:

> "(c) *Right to refile.* Dismissal of applications pursuant to this section will be without prejudice to the right of the applicant at any time to file a new application seeking all or any part of the route authority requested by the application which has been dismissed. Such new application will be assigned a new docket number."

While any carrier has a right to reconsideration of such an order of dismissal, the common practice of the carriers is simply to refile those applications in which they have a present interest. Delta also fails to disclose that it did not refile the "excluded applications" on which it now predicates its *Ashbacker* claim.

The significance of this dismissal was urged below, not by Delta but by Continental, with Delta contending that the dismissal had no effect on its *Ashbacker* claim. In its brief to the Court of Appeals, Delta's only reference to the dismissal of its applications occurred at the end of a long footnote. In its brief to the Court of Appeals (p. 39), Continental pointed out that Delta had no pending application:

> "The application which Delta contends was denied comparative consideration was not even pending at the time of the remanded hearing of the Houston-Miami route. Delta's earlier applications were dismissed by the Board as 'stale' on September 21, 1970. Order 70-9-10; S.J.A. 452-53. That dismissal occurred five months before the Court's decision reversing and remanding the case. Delta

did not refile its applications, although it was personally served with the Board's order dismissing its application and had more than adequate opportunity to do so.[57] For that reason alone, Delta has waived any right to an *Ashbacker* claim.

[57] "Delta references this fact by footnote only and asserts without any rationale that dismissal of its application 'cannot destroy Delta's *Ashbacker* rights.' Brief, p. 27, fn. 2. Without an application pending, there can be no denial of a right of comparative hearing. Delta's abandonment of its application was consistent with its position in the original proceeding. The only aspect of the application that Delta had pursued was service via Dallas, not via Houston. It gained no new authority via Dallas, so it had every reason to abandon its application."

In a complete reversal of its position below, Delta now seeks to make a virtue of its own failure to refile its "excluded applications." The answer to this is that Delta was not prejudiced by the dismissal of these applications. As discussed in the final section of this argument, Delta was permitted to introduce evidence on its *Ashbacker* claim as though it had a pending application, and Delta's *Ashbacker* argument was considered *in extenso* on its merits by the administrative law judge in his initial decision, the Board in its decision, the Board in its order on reconsideration, and the Court of Appeals in its opinion. Delta's failure to show mutual exclusivity, like its failure to refile the applications, is its own responsibility, not a defect in the administrative process calling for this Court's correction.

IV. Delta Has Failed To Demonstrate Mutual Exclusivity as a Matter of Economic Fact.

Delta's petition wholly ignores the final defect in its *Ashbacker* argument: that it was given an opportunity to establish the factual basis for its claim of prejudice and failed to do so.

As noted heretofore, Delta's applications sought authority between California and Florida via numerous cities in the Southeast and Southwest. While the Board excluded portions of these applications from consideration in the original *Southern Tier* case, it afforded Delta an opportunity "to show that there is a mutual exclusivity which we have not foreseen." Order E-25720, September 21, 1967, at p. 3; S.J.A. 12.[8]

Delta did not even seek to show mutual exclusivity in regard to the Houston-Miami market. In the original phase of the *Southern Tier* case, Delta's *Ashbacker* exhibits consisted of a "specimen pattern of service" to be operated as a third California-Florida carrier. DL-200I-201I; J.A. 838, 839. The services proposed operated between Miami, on the one hand, and Los Angeles and San Francisco, on the other hand, via New Orleans, San Antonio, Dallas, El Paso, Albuquerque and Phoenix. All Miami services either originated or terminated in California, and flights serving El Paso, San Antonio, Albuquerque and Phoenix were routed either nonstop to Miami or over the Dallas or New Orleans gateways. *No service was shown via Houston.* Houston was not included in any of the routings. In fact, Delta concentrated its "exclusivity" argument on Atlanta. Its exhibit DL-200J (J.A. 857) focused entirely on the Atlanta-Albuquerque/El Paso/Phoenix markets. Delta received Atlanta-Phoenix authority via Dallas in the *Dallas-Phoenix* case, but lost Atlanta-Albuquerque authority when Texas International and Frontier were selected in the *Service to Albuquerque*

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[8] See also *National Airlines, Inc.* v. *CAB*, 129 U.S. App. D.C. at 187, 392 F.2d at 511.

Case, Order 69-7-136, July 24, 1969, to serve the Dallas-Albuquerque market.[9] No carrier received Atlanta-El Paso authority, nor would Continental receive such authority here.

In the remanded Houston-Miami Phase of *Southern Tier,* Delta offered no specimen schedules. Since only Houston was at issue as a gateway to Miami, there was no evidence as to how Delta would implement the authority which it claimed was mutually excluded. Delta's *Ashbacker* exhibits in the remanded phase were limited to a series of traffic projections to which it applied a test used by the Board in the *Gulf States-Midwest Points Service Investigation* (Order E-24202, September 19, 1966) to measure the desirability of certificating competitive nonstop service. DL-902-905; J.A. 928-31.[10] Based on this limited evidence, Judge Dapper properly found that Delta's application for nonstop authority "would not be precluded by an award to Continental." I.D., p. 64; S.J.A. 542.

Then, on brief to the Board, Delta attacked Judge Dapper's finding by asserting that nonstop and one-stop service are on a "competitive near-parity." Delta Brief to the Civil Aeronautics Board, p. 38; J.A. 393. However, none of Delta's evidence supports this claim. Nowhere in its exhibits did Delta attempt to show "competitive near-parity," since it was obviously preoccupied with competitive nonstop service. The Board thus correctly found that "Delta has not established that Continental's single-plane flights between Miami and San Antonio, El Paso and Phoenix and its own application for nonstop rights in each of these markets

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[9] Had Delta been selected, it could have operated Atlanta-Albuquerque service via Dallas.

[10] See ELP-821R, pp. 3-4; J.A. 974-5.

are mutually exclusive as a matter of law or economic fact." Order 73-2-89, pp. 14-15; S.J.A. 574-575; Appendix C, p. 36.

In its petition for reconsideration, Delta for the first time contended that Continental's one-stop services via Houston would mutually exclude Delta's application, since Delta's application sought *all* forms of authority, *i.e.,* non-stop, one-stop, two-stop, etc. Delta Petition for Reconsideration, p. 18; J.A. 566. While noting that this particular argument had been raised by Delta for the first time in seeking reconsideration, the Board nonetheless traced back through Delta's evidence in the remanded phase. The Board found that:

> "Specifically, the only evidentiary support in the remanded proceeding for Delta's claim of mutual exclusivity appears in exhibits DL-901-905. These exhibits simply show O&D and interline connecting traffic in the Miami-Albuquerque, Miami-El Paso, Miami-Phoenix, and Miami-San Antonio markets. The point of these exhibits is that traffic in these markets does not approach the 100 passenger a day 'standard' which was used by the Board in 1966 (*Gulf States-Midwest Points Service Investigation,* Order E-24202, September 19, 1966) as a benchmark for considering an award of competitive nonstop service; and, thus, that Continental's entry into the markets would preclude an award of competitive nonstop authority to Delta. However, to the extent that Delta now argues that Continental's operations would preclude—as an economic matter—other *one-stop* operations, its new contention is without record support because such an economic issue cannot be decided by considering only Miami-El Paso/Phoenix/Albuquerque/San Antonio traffic data alone, *i.e.,* without also examining intermediate traffic support (*e.g.,* Miami-New Orleans/Dallas and Dallas/New Or-

> leans-El Paso / Phoenix / Albuquerque / San Antonio) which would have been available to support Delta's flights. . . ." Order 73-5-22, pp. 6-7; S.J.A. 692-93; Appendix D, pp. 64-65.

Thus, unlike the situation presented in Part I of *Second Delta,* on which Delta relies in its argument here, this case involves no *prima facie* showing of mutual exclusivity. Indeed, an examination of the record reveals that Delta altogether failed to support its *Ashbacker* claim. As the Board found:

> "By limiting its evidentiary showing to a recital of traffic in the Miami-El Paso/Phoenix/San Antonio/Albuquerque markets, Delta has not established that Continental's operations would preclude Delta's proposed routings in the 'excluded' markets. Thus, there is no more basis for a finding of legal or actual exclusivity with respect to the one-stop services than for the non-stop operations. . . ." Order 73-5-22, p. 7; S.J.A. 693; Appendix D, pp. 65-66.

In *Second Delta,* the court admonished the Board for its failure to make findings to support its assertion of lack of mutual exclusivity. 107 U.S. App. D.C. at 183, 275 F.2d at 641. In this case, however, the Board made specific findings based on the evidence of record. Its conclusion that mutual exclusivity does not exist is fully supported by the record.

CONCLUSION

Delta's strained interpretation of the *Ashbacker* doctrine, the sole basis on which it seeks a writ of certiorari, has been considered and either explicitly or implicitly rejected eleven times—by the Board in scoping the original proceeding; by the Court of Appeals prior

to the first hearing; by the Administrative Law Judge in that hearing; by the Court of Appeals in reversing the award to Delta; by the Law Judge in the remanded proceedings; by the Board in its order making the award to Continental; by the Board in denying Delta's petition for reconsideration; by the Court of Appeals in affirming the Board's decision; again by that court in denying Delta's petition for rehearing; again by that court in refusing to stay its mandate; and by Mr. Chief Justice Burger in denying its motion to this Court for a stay of the mandate of the Court of Appeals.

Delta does not contend that the prior decisions of the United States Court of Appeals for the District of Columbia, on which that court relied in denying its *Ashbacker* claim, were wrongly decided, nor does Delta cite any opinions of other circuits or any prior decisions of this Court which the Court of Appeals has failed to follow. Rather, it asserts only that the Court of Appeals for the District of Columbia Circuit wrongly selected from its own precedents in deciding the instant case. That court has not only rejected Delta's argument; it is significant that no member of that court found sufficient merit in the argument even to request a vote on Delta's suggestion for rehearing in banc.

Not only does Delta present no conflict between the circuits and no conflict with the decision of this Court, it proffers to this Court no important or novel issue. The case involves the application of well established rules of law to well supported factual findings. There is no reasonable basis for this Court to grant review on writ of certiorari.

WHEREFORE, Continental respectfully prays that the Court deny the petition.

Respectfully submitted,

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May 11, 1974 *

* Corrected copy substituted on May 21, 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1274

DELTA AIR LINES, INC.,
Petitioner

v.

CIVIL AERONAUTICS BOARD, *ET AL.*,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The City of El Paso, the El Paso Airport Board and the El Paso Chamber of Commerce (the El Paso Civic Interests) oppose the petition of Delta Air Lines, Inc. (Delta) for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals' judgment in this case was entered on October 23, 1973.

Petitioner's statements pertaining to the opinion below, grounds of jurisdiction of this Court and the statutes involved

are acceptable to Respondent. Accordingly, pursuant to rule 40(3) of this Court, Respondent's brief does not contain such statements.

QUESTION PRESENTED

Whether the Civil Aeronautics Board (Board) under the circumstances of the case violated the principles enunciated in the case of *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945), by refusing to consolidate or hear the applications of Delta, and then thereafter awarding the route in question to Continental Air Lines, Inc. (Continental)?

COUNTER STATEMENT OF THE CASE

This case comes to this Court as a result of an administrative decision by the Board which was subsequently upheld by the Court of Appeals for the District of Columbia Circuit. The proceeding at the administrative level was known as the *Southern Tier Competitive Nonstop Service Investigation (Houston-Miami Phase)*, Board Docket 18257 (*Southern Tier*). In that proceeding the Board awarded a Houston-Miami route to Continental.

Because of their interest in obtaining single carrier service to the southeast, the El Paso Civic Interests have participated as an intervenor in this case and its predecessor proceedings before the Board since 1967. After an analysis of the proposals of the carrier applicants, they have supported Continental as the air carrier best able to provide the competitive service needed on the Houston-Miami route.

The proceeding originally commenced in 1967 when the Board undertook an investigation regarding the need for competitive nonstop service in 18 major markets across the so called "Southern Tier" of the United States. At that time those markets were largely served by Delta and by National Airlines, Inc. (National). One of the markets in the investigation was the Houston-Miami route which was served exclusively by National.

In order to confine the investigation to "manageable proportions" and to focus on those markets where additional unrestricted authority might be justified, the Board decided to limit the scope of the proceeding to designated markets rather than commence an area proceeding. The Board also imposed a pretrial restriction to the effect that any award to a carrier not then authorized to serve the markets at issue would be in the form of a new segment instead of an addition to an existing segment.

Shortly thereafter Delta and other carriers moved to expand the scope of the case to include other markets. Specifically Delta requested, *inter alia*, consolidation of applications for (1) a new route from San Francisco and Los Angeles to Miami via intermediate points which included Phoenix, Albuquerque, El Paso, Dallas, Huntsville, Atlanta and Tampa and (2) another segment between the same west coast points and Miami via other cities including Phoenix, El Paso, Albuquerque, Dallas, San Antonio, Houston, New Orleans and Tampa.

The Board on September 21, 1967 denied these motions. The Board was convinced that a broadening of the scope of the proceeding would begin a "chain reaction" which could ultimately result in an overall investigation of the service needs of all of the southern tier of states which encompassed hundreds of markets. Thus, the Board refused to consolidate Delta's applications except insofar as they were already then included in the proceeding. The Board also rejected Delta's *Ashbacker* claim that a refusal to consolidate its applications would require the Board to impose single-plane restrictions on the operations of other applicants. The Board found that if such contentions were true then there would be no geographical limit to a proceeding. The Board noted that it could not enlarge the proceeding's scope just because certain carriers may have had more beyond-area traffic advantages than others in the segments under consideration. The Board recognized that differing route patterns afforded carriers varying advantages in the service they could offer in any proceedings and that it would be impractical to attempt to fashion one in which all were equal. The Board,

however, did not preclude Delta from submitting evidence which might establish a need for more or different restrictions or which might establish mutual exclusivity and indeed invited Delta to submit such evidence.

Thereafter in October of 1967 Delta together with National petitioned the United States Court of Appeals for the District of Columbia for review of the Board's order. The Court of Appeals dismissed the petition for lack of jurisdiction, *National Airlines v. Civil Aeronautics Board*, 392 F.2d 504 (D.C. Cir. 1968) observing that Delta's *Ashbacker* claims were similar to those advanced in *Eastern Airlines, Inc. v. Civil Aeronautics Board*, 243 F. 2d 607 (D.C. Cir. 1957). The Court noted that *Ashbacker* did not of necessity require the Board to enlarge a proceeding to include abutting segments or prohibit the Board from considering in a separate proceeding an area that bordered on, or lay wholly within, the area covered in another proceeding. Moreover, the Court distinguished the case before it from *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 275 F. 2d 632 (D.C. Cir. 1959), *cert. denied* 362 U.S. 969 (1960), (*Second Delta*).

The case was returned to the Board and after a full hearing the Board Examiner (now referred to as an Administrative Law Judge) selected Continental to provide the service which he found was necessary in the Houston-Miami market. All carrier applicants were considered upon the basis of their plans of operation. The Board Examiner concluded that Continental should be selected to provide competition in Houston-Miami since it could give the best public service in that market and would be able to provide first single-plane and single-carrier service through connection at Houston of its existing system with the Houston-Miami segment.

Delta argued that the mandate of *Ashbacker* had been violated because the Board had refused to consolidate *Southern Tier* with other cases particularly with Delta's applications to serve Albuquerque, San Antonio, El Paso and Phoenix. However, the examiner rejected such argument when he found that approval of Delta's contentions would result in investigation of 30 markets and additional beyond-segment markets. Moreover,

he found that at that time there was insufficient traffic to support a new authorization limited to the cities specifically noted above.

The Board selected Delta as the carrier to provide the required service in Houston-Miami (Order 69-7-135 dated July 25, 1969). However, with respect to Delta's *Ashbacker* claims regarding those applications which had been denied consolidation, the Board dismissed them finding that the award it made would not have the effect of precluding any of those applications.

Continental then sought review in the United States Court of Appeals for the District of Columbia of the Board's decision contending that the Board had failed to consider those factors which related to the greater public service benefits Continental could provide. The Court of Appeals agreed, set aside the award to Delta and remanded the case to the Board for further proceedings, *Continental Air Lines, Inc. v. Civil Aeronautics Board*, 443 F. 2d 745 (D.C. Cir. 1971). In remanding the case, the Court directed the Board to consider and evaluate all pertinent factors in comparing Delta and Continental for selection of the carrier to serve Houston-Miami.

On April 4, 1972 a full evidentiary hearing was commenced before a different Administrative Law Judge who thereafter issued his decision on July 21, 1972. Once again the carrier selected to serve the route was Continental. In reaching his decision the law judge carefully followed the instructions the Court of Appeals had set forth in its opinion. He thoroughly considered, *inter alia*, the service proposals of all applicants including Delta according to ten separate factors. He concluded his findings by stating that the carrier factors viewed on the whole clearly favored Continental's selection.

Once again Delta's *Ashbacker* contentions were considered and rejected. The law judge concluded that they lacked substantial merit and noted that the Board was not required to tailor each route proceeding so as to nullify the advantages one carrier had over another because of an existing route system. The Board, he stated, was under no judicial obligations to insure that Delta was on an equal basis with Continental in beyond-

area capabilities. The law judge evaluated Delta's *Ashbacker* arguments by examining the evidence of mutual exclusivity it had submitted at the hearing. He found that mutual exclusivity did not exist.

The Board on February 23, 1973 affirmed the law judge's decision, adopting his findings and conclusions as their own (Order 73-2-89) (App. C, p. 23).[1] The Board based its selection of Continental upon traditional carrier selection factors rather than upon industry balance considerations. Its choice of Continental was predicated primarily on the fact that Continental would bring greater service benefits than any other applicant to the primary market and offer superior beyond-area benefits as well (Order 73-2-89 at p. 5) (App. C, p. 28).

Once again Delta's *Ashbacker* claims were heard, considered and rejected. The Board found that Delta had not shown the markets in question to be mutually exclusive and that the Board was not required to tailor its proceedings so as to equalize the beyond-area capabilities of all applicants in a route case.

Delta petitioned for reconsideration of its *Ashbacker* contentions; however, the petition was rejected by the Board in its Order 73-5-22 dated May 4, 1973 (App. D, p. 59). In that order the Board noted that Delta's assertion of mutual exclusiveness between Continental's operations and Delta's one-stop authority (as opposed to nonstop authority) between Miami and the cities west of Houston was a new contention without record support. However, the Board found that *Ashbacker* did not require the Board to splinter an unrestricted application into sections and compare them with similarly segregated sections of other applications.

A petition for review of both Board orders was then filed by Delta with the United States Court of Appeals for the District of Columbia Circuit. On October 23, 1973 the Court of Appeals denied Delta's petition and affirmed the Board's decision relying upon its decision in the *National* case with

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[1] Citations herein to Delta's Appendix—"App."

respect to the *Ashbacker* arguments (App. A, p. 1). In direct reply to Delta's arguments the Court stated that contrary to what Delta claimed the Board's decision did not rely in dominant degree upon the beyond-area benefits to the "excluded points." The Court further stated that Delta's *Ashbacker* claims rested on the fallacy that Continental was selected for its ability to serve the needs of the excluded cities whereas it was actually selected upon evaluation of the Houston-Miami market and Continental's ability to serve it. The Court noted that it was not inherently unfair that pre-existing certificates give an advantage to certain applicants for a new segment and that if an equalization approach were opened submission of defensive route applications would be encouraged. In this respect, the Court felt that the Board had to act realistically in terms of existing route identification and business patterns.[2]

REASONS FOR DENYING THE WRIT

The principles set forth in the *Ashbacker* decision have been utilized and explicated in several decisions by the District of Columbia Circuit Court of Appeals involving airline route cases. In those cases the Court has carefully considered *Ashbacker* contentions and has handled them in a realistic manner perfectly consistent with the *Ashbacker* decision. The Court in the case at hand acted no differently and rendered a decision in accord with its previous decisions in similar cases and in accord with *Ashbacker* principles.

While Delta argues that the Court failed to give consideration to and overruled the "leading decision" in which *Ashbacker* rights were held violated, it will be seen herein that the Court did not need to make reference to *Second Delta* and did not overrule it. The Court, in our opinion, rendered its decision in accordance with the applicable legal precedents and did not violate the *Ashbacker* doctrine.

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[2]Delta later petitioned the Court for rehearing but that petition was denied (App. F, p. 81).

ARGUMENT

I.

THE DECISSION BELOW IS CONSISTENT WITH THOSE PRINCIPLESS ENUNCIATED IN THE ASHBACKER CASE

In its briief Delta argues that the decision of the Court of Appeals in affffirming the Board's selection of Continental to serve Houston-Miami unnecessarily abridged its *Ashbacker* right to file responnsive route applications and have hearings held thereon. Deltta additionally argues that there is no real difference betweeen the case herein and *Second Delta* and that therefore the Court's decision should have followed *Second Delta* in resultt. Since the Court did not reach the same decision as in *Seconnd Delta*, Delta claims that the Court thereby improperly overruled that case.

As will be shown herein, the Court's decision did not violate the *Ashbacker* doctrine, did not overrule *Second Delta* and was basedd upon Continental's ability to serve the market in question betteer than any other carrier.

A. The Awward to Continental of the Houston-Miami Route was Baseed Upon its Ability to Offer Total Service Benefits

In its bbrief Delta attempts to show that there is no distinction boetween *Second Delta* and the case herein since, as Delta claims, , both were decided upon the basis of beyond-area benefits. Delta makes reference to the Board's statement regarding its choice of Continental (petition at pp. 9 and 10) and asserts tthat beyond-area benefits was "the very factor" leading to Continental's selection. Delta's claims in these respects are sisimply not true.

In selecting Continental as the carrier to serve the route in question thee Administrative Law Judge after comparing all applicants inncluding Delta in ten separate categories, stated at page 58 of hiis decision that:

"The selection of carrier *factors*, viewed in the *aggregate*, clearly favor Continental. That carrier has a distinct and significant advantage in terms of beyond-area benefits, frequencies to be operated over the segment, and the proposed economy fare." (emphasis supplied)

Thus it is clear that the law judge did not select Continental upon the sole consideration of beyond-area benefits. Moreover, it is also true that the Board did not select Continental upoh "the very factor" of beyond-area benefits. On the very first page of its Opinion the Board stated that "we adopt his [Administrative Law Judge] findings and conclusions as our own." (Order 73-2-89) (App. C, p. 25). While Delta has quoted an isolated paragraph from the Board's opinion describing beyond-area benefits as being "the very factor" for Continental's selection, it has neglected to refer in any manner to other portions of the opinion wherein it is plainly demonstrated that beyond-area benefits was not the only factor considered and used in selecting Continental. For example, on page 5 of its Opinion the Board stated:

"Our choice of Continental for a Houston-Miami award is predicated primarily on the fact that it will bring *greater service benefits* than any other applicant to the primary market and offer superior beyond-area advantages as well. At the same time, we believe that Continental's proposal will not seriously harm any other carrier." (Order 73-2-89 at 5, App. C, p. 28) (emphasis supplied).

Thereafter the Board discussed why its choice changed from Delta to Continental offering many reasons. The Board concluded:

"For *all these reasons*, our choice of a Houston-Miami competitor, like Judge Dapper's, turns on the traditional carrier selection factors directly applicable to the market at issue rather than on wider industry balance considerations." (Order 73-2-89 at 7, App. C, p. 30) (emphasis supplied).

The Board then discussed and analyzed *six separate factors* in relation to Delta and other applicants after which it concluded that the public convenience and necessity required that Continental be selected.

The Court of Appeals in affirming the choice of Continental also recognized that selection of Continental was not based upon "the very factor" of beyond-area benefits when it stated at page 12 (App. A, pp. 12 and 18) of its Opinion that:

> "It suffices to say that the Board decision does not rest in dominant degree upon the beyond-area benefits to the 'excluded points'. That is to say, this is not a case where Continental had no advantage over the competing carriers in terms of Houston-Miami service, and was awarded the route because of the beyond-area benefits. The Board was primarily focused on service between Houston and Miami and did not, fairly speaking, convert this into an area case which turned on determination of the service to and from excluded points, or any determination of the need for such service or the carrier best qualified to give such service."

The Court below, while noting that the Board did give consideration to beyond-area benefits, found that such consideration was given for the purpose of "appraising the feasibility and realism" in Continental's proposal and in appraising the "quantity and quality" of Continental's service (App. A, p. 12). Thus the Court correctly concluded that:

> "... Delta's *Ashbacker* claim rests on the fallacy that Continental was selected for its ability to serve the needs of the excluded cities whereas it was actually selected upon evaluation of the Houston-Miami market, its need for service, and the kind of service in that market proferred by Continental, including the service made possible by Continental's backup support—four well spaced round trips daily at fare reductions, and all of the other items discussed above." (App. A, p. 13).

It is therefore clear that neither the Administrative Law Judge, the Board nor the Court of Appeals based its decision solely upon the factor of beyond-area benefits. Therefore, Delta's claim in this respect that its *Ashbacker* rights were violated must be dismissed.[3]

B. The Court of Appeals Decision Did Not Overrule Second Delta

Delta argues that the Court of Appeals' decision overruled the *Second Delta* case without any explanation since it did not mention *Second Delta*. That argument is premised upon Delta's assertions that the facts of *Second Delta* and the case herein were similar in terms of consideration of beyond-area benefits and that Continental's selection was based solely upon beyond-area considerations. It has already been shown that Continental's selection was based upon the total service benefits that it could bring to the Houston-Miami market and that beyond-area benefits was merely one of the many factors included in such. It will now be shown that while *Second Delta* was not mentioned in the Court's decision it was not necessary to do so.

Delta's reliance upon *Second Delta* as the controlling case herein is without any foundation and is erroneous. The Court in that case was dealing with a situation quite unlike the situation present in the case at hand. In that case the Court found an *Ashbacker* violation had occurred since the Board had selected Trans World Airlines, Inc. (TWA) to serve the St. Louis-Southeast route *solely* for the reason that TWA could provide transcontinental service between Florida and California, at a time when the California-Florida route was the subject of a pending investigation.

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[3] Delta would even have this Court believe that the Board should not have considered Continental's beyond-area benefits in making the carrier selection. In this connection it may be pointed out that the same Court of Appeals in *Frontier Airlines, Inc. v. Civil Aeronautics Board*, 259 F. 2d 808 (D.C. Cir. 1958) stated:

> "... it is sufficient to say that we think the needs of beyond area traffic may in many factual situations be a proper concern in the problem of establishing new air routes. In many situations we do not see how it could be otherwise." (259 F. 2d at 810).

> "The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast." (275 F. 2d at 636).

There was no doubt of the Board's preoccupation with consideration of beyond-area traffic in awarding TWA the route for in its original opinion in the *St. Louis-Southeast Service Case*, 27 C.A.B. 342 (1958), the Board stated at page 350:

> "In view of the growing importance of the southeast area, both from an economic and a national defense standpoint, as well as the increasing volume of traffic exchanged between the Southeast and cities west of the Mississippi, we see no reason on the present record to deny the traveling public the additional single-plane frequencies that TWA will be able to offer . . ."

Thus, there was no question but that the Board had considered and had based its decision strictly upon beyond-area benefits so that transcontinental service between Florida and California could be established. This violated *Ashbacker* since at the time of the award to TWA, the petitioners had applications pending for through routes between Florida and California.

In the instant case there were no findings by the Board similar to those in *Second Delta* regarding beyond-area traffic and there were no bases for any similar findings.

It is submitted that in determining whether *Second Delta* was overruled by the Court's decision below, this Court ought to give consideration to the Court of Appeals' observation in *Second Delta* that consideration of beyond-area traffic insofar as it permits a carrier to generate more frequencies over the segment in question is

> ". . . certainly pertinent to the selection of a carrier to perform intra-area services found necessary because of service deficiencies within the area; such traffic may well,

as the Board found, be used to provide the base for proper traffic development within the area." (275 F. 2d at 642).

Delta's assertion that consideration of Continental's beyond-area traffic was improper pales in the face of the above when it is considered that the deficiency in the Houston-Miami market was insufficient nonstop service and that Continental's beyond-area traffic would enable Continental to provide more nonstop flights in the market than any other carrier including Delta.

II.

THE BOARD HAS DISCRETIONARY POWER TO LIMIT THE SCOPE OF AIR ROUTE INVESTIGATIONS IN APPROPRIATE SITUATIONS AND SUCH POWER DOES NOT VIOLATE THE HEARING PROVISIONS OF THE FEDERAL AVIATION ACT

Delta contends that the Court below stripped the *Ashbacker* doctrine of vitality in air route cases by accepting the Board's assertion that it could in its discretion disregard "defensive" route applications. This, says Delta, violates the hearing provisions of the Federal Aviation Act [§401(c)].[4] Delta further argues that the Board when it commences a new route proceeding *sua sponte* and selects the route segments to be competed for, must hold hearings on all responsive applications filed. In making those contentions Delta concedes at the same time that the Board must retain "considerable discretion in defining the scope of air route cases" (petition at 16). Delta's arguments, however, appear to ignore that very concession.

Contrary to what Delta infers, the Court below did not in any manner characterize Delta's excluded applications as "defensive" maneuvers to gain *Ashbacker* rights. Rather, the Court merely observed that if attempts were made to equalize the beyond-area benefits in route proceedings then unrestricted

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[4] 49 U.S.C. 1371(c)

"defensive" route applications would be unnecessarily encouraged. If that occurred then routine investigations of single markets could be turned into enormous investigations encompassing numerous markets. In such cases the Board would be faced with monumental problems with the likely result that route investigations would never be completed within reasonable time frames. The damage which such eventualities would cause to the traveling public and the air industry would be irreparable.

Delta's use of the term "responsive" applications would include "defensive" applications and thus would lead to the disasterous situations noted above. Quite obviously *Ashbacker* was never intended to be extended to the lengths which Delta seeks to extend it. The Court's decision below applied the *Ashbacker* doctrine in a reasonable and practical fashion without sapping it of its real meaning. Under Delta's interpretation the *Ashbacker* doctrine would be applied in an illogical and impractical fashion.

Despite Delta's contentions to the contrary, it is clear that its route applications were not rejected because they were "defensive" (although they may have been "defensive") but, rather, they were rejected because they did not comport with the limitations placed upon the *Southern Tier* investigation by the Board. Thus, the question resolves itself into whether or not the Board had the right to so limit the proceeding and reject Delta's applications while at the same time giving consideration to Continental's beyond-area benefits. It is submitted that the Board had such a right and did not abuse it in this case. In the context of all the facts the Court of Appeals agreed by upholding the Board's selection of Continental.

The Court below affirmed the Board's right to place reasonable restrictions upon the scope of route proceedings and affirmed the Board's right in selecting carriers for routes to give consideration to a carrier's existing routes within the context of a sensible interpretation of *Ashbacker* principles. The Court's decision in those respects did not represent a break with the *Ashbacker* doctrine or abridge Delta's rights pursuant to the hearing provision of the Federal Aviation Act. The principles of

Ashbacker do not require that the Board be made to choose between conducting a massive investigation and refusing to consider a route applicant's backup traffic.

The Board's action in limiting the scope of *Southern Tier* and in rejecting Delta's efforts to expand it is not without precedent. In the *Eastern* case, *supra*, the Court of Appeals recognized the discretionary power of the Board in limiting the scope of air route investigations and also recognized that "defensive" applications were not legitimate uses of the *Ashbacker* doctrine:

> "Despite Ashbacker it seems to us that the Board must have a measure of discretion in placing limits to the extent of a given proceeding. Certainly the Ashbacker doctrine is not available for *mere tactical maneuver purposes.* An existing certificate holder cannot by the mere filing of applications for routes transform a limited inquiry into a massive consideration of the whole of American air transportation. The problem is typically one for agency judgment. If the Board is not unreasonable in its limitation of a proceeding, the courts ought not to interfere, even if they have power to do so." (243 F. 2d at 609) (emphasis supplied).

The Court of Appeals in the *National* case, *supra* upheld the Board's decision to place geographical limitations on the proceedings and solidified its own holdings in the *Eastern* case by refusing to transform *Southern Tier* into a massive area investigation. The Court emphasized, as it had in *Eastern*, that the *Ashbacker* rule of a right to a comparative hearing was founded on practicalities and was a fluid right. The Court then stated:

> "While we adhere to the principle that 'the Board cannot, either intentionally or by the demonstrable effect of an order, avoid * * * the *Ashbacker* doctrine,' we reiterate that the Board must be free to *exercise a considerable measure of discretion in defining the scope of air route cases.*" (392 F. 2d at 508) (emphasis supplied).

The *Eastern* and *National* cases make it crystal clear that the Board may indeed, without violating *Ashbacker*, reject route applications which do not comply with the limitations reasonably placed on the scope of the air route under consideration. Those cases also make it clear that *Ashbacker* does not require the Board, as Delta would have this Court believe, to choose between being saddled with an expansion of a limited investigation into a massive investigation and being made to conduct an investigation without giving consideration to beyond-area benefits in selection of a carrier. As the Court in the *National* case stated:

> "Pre-existing route intricacies render it almost impossible for the Board to tailor its proceedings so as to equalize the advantages and disadvantages with which each applicant enters a comparative proceeding. The maturing and sophisticated route structure and development preclude a simplistic vindication of *Ashbacker* claims." (392 F. 2d at 508).

Acceptance of Delta's strained view of *Ashbacker* in the instant case would in effect require rejection of holdings in both the *Eastern* and *National* cases. There are, however, no cogent reasons as to why such precedents should be rejected or ignored in the instant case.

Delta's petition would have this Court apply *Ashbacker* in a mechanical fashion without regard to the realities and practicalities of air route proceedings. Inherent in such an application of *Ashbacker* would be curtailment of legitimate agency discretion and unfettered acceptance and approval of tactical maneuvering of "defensive applications." It is submitted that such an interpretation and application of *Ashbacker* is contrary to settled law.

In sum, the decision below does not abridge the right of carriers to file truly responsive applications in route cases but merely follows settled law in permitting the Board to reasonably restrict the scope of air route investigations.

CONCLUSION

The decision below follows the applicable precedents, preserves the Board's right to exercise reasonable discretion in limiting areas to be considered in air route proceedings, gives legitimate but not undue recognition to the beyond-area benefits without violating *Ashbacker*, and upholds selection of the carrier best able to serve the needs of the traveling public in the Houston-Miami market. Therefore, the decision below should not be reviewed by this Court and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1274

DELTA AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents*

BRIEF OPPOSING PETITION FOR CERTIORARI

Submitted by
THE CITY OF HOUSTON, TEXAS
and
THE HOUSTON CHAMBER OF COMMERCE

QUESTION PRESENTED

Whether the *Ashbacker* doctrine [1] of fair comparative hearing requires the Civil Aeronautics Board to define the scope of new route (licensing) proceedings

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[1] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

so as to equalize differences among the respective qualifications of competing applicants resulting from differences in their existing routes.

STATEMENT OF THE CASE

The *Southern Tier Competitive Nonstop Investigation* was instituted by the Civil Aeronautics Board (Board) in 1967 to determine the need for competitive airline service in 18 specified city-pair markets. These included the city-pair Houston-Miami but did not include city pairs made up of Miami or Houston, on the one hand, and Phoenix, Albuquerque, El Paso and San Antonio, on the other. The Board declined timely requests by a number of parties including Houston as well as petitioner Delta Air Lines, Inc. (Delta) to include the latter city pairs in the *Investigation.*

Continental throughout the *Investigation* held route authority between Houston, on the one hand, and Phoenix, Albuquerque, El Paso and San Antonio, on the other. Delta had no authority in any of these markets. During the proceedings it developed that this difference in the pre-existing authority of these carriers worked in favor of Continental and against Delta in the competition for a Houston-Miami award. The availability of Miami passengers from city sources west of Houston permitted Continental to propose greater Houston-Miami frequency using larger aircraft than could Delta, lacking access to such passengers. At the same time, Continental was able to offer Phoenix, Albuquerque, El Paso and San Antonio passengers the convenience of travel to and from Miami without changing planes—a benefit that Delta could not offer.

These differences led the Board to the selection of Continental over Delta for the Houston-Miami route. Delta urged below that *Ashbacker* required the Board to give Delta a simultaneous opportunity to seek authority to provide Phoenix, Albuquerque, El Paso and San Antonio-Miami service via Houston in order to give Delta a "fair" comparative hearing as against Continental. The Board and the Court below rejected Delta's argument. No new authority was at issue or awarded in these Houston-west markets either in the *Southern Tier* Case or any other contemporaneous proceedings.

ARGUMENT

I. THE QUESTION WHETHER THE ASHBACKER DOCTRINE OF FAIR COMPARATIVE HEARING IS APPLICABLE TO AIRLINE ROUTE CASES IS NOT IN THIS CASE.

Delta contends that the Court should grant certiorari to consider "Whether the *Ashbacker* doctrine of fair comparative hearing is applicable to airline route cases . . . ." Delta, Petition, p. 2. This would be an "important" question for this Court to consider if it were presented, but it is not. All Court decisions reviewing Civil Aeronautics Board orders, in every circuit, have held or assumed that the *Ashbacker* doctrine *does* apply. The Court below applied it, and applied it correctly, in the instant case.

There is thus no way in which this Court could reach the question as stated by Delta. In fact, the section of Delta's brief devoted to this question concedes that the answer is "established" in the courts of appeals (Delta, Petition, p. 14).

II. THE QUESTIONS OF ADMINISTRATIVE PROCEDURE WERE RESOLVED CORRECTLY, WITH DUE REGARD FOR A BALANCE BETWEEN PRIVATE RIGHTS AND THE FLEXIBILITY IN FASHIONING THE SCOPE OF ITS PROCEEDINGS ESSENTIAL TO AN AGENCY IN ORDER TO ACT IN THE PUBLIC INTEREST, AND IN ACCORDANCE WITH PRECEDENT.

This case does not present to this Court questions of the propriety of the Board's "staleness" rule (14 C.F.R. § 302.911) nor does it present a controversy over the speed or order with which the Board may dispose of matters on its docket. The Court below did not decide the case on such grounds.

Delta contended that the Board was required to consider new Houston-west authority for Delta allowing Delta to duplicate Miami services which Continental (the holder of Houston-west authority) could provide with an award of Houston-Miami authority. The Court held that the Board was not required to consolidate Delta's Houston-west applications. Delta argues that this holding constitutes an overruling *sub silentio* of *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 275 F.2d 632 (C.A.D.C.), cert. denied, 362 U.S. 969 *("Second Delta"),* a leading decision in the same circuit. The decision below accords, however, with an equally important leading decision, *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 243 F.2d 607 (C.A. D.C.), which Delta attempts to distinguish from the instant case (Delta, Petition, p. 19, n. 20).

The fact is that the decision below is not in conflict with *Second Delta* and is compelled and governed directly by *Eastern Air Lines.* In *Second Delta* the transcontinental route involved was placed at issue in one proceeding but awarded in another, different proceeding where it was expressly not at issue. In

Eastern Air Lines, and in the instant case, the authority sought by the applicants petitioning for judicial relief was as a matter of discretion *never* placed in issue or awarded to any carrier in any proceeding. In *Eastern Air Lines,* Eastern sought extension westward over the routes of Northwest. In the instant case, Delta sought extension west of Houston over Continental's routes. In each instance the Court below consistently held that the Board need not under *Ashbacker* place such extensions in issue.

Delta attempts to distinguish the instant case from *Eastern Air Lines, supra,* by the bald assertion that *Eastern Air Lines* involved an "area-type" proceeding, while the instant case involved "discrete markets" rather than an area. Delta does not allege, and cannot show, any lack of objectivity in the Board's selection of the "discrete" markets. The history of the proceeding demonstrates that they were selected on the basis of historic origin-destination and connecting traffic levels in a particular year, and the exclusion of certain Houston-west markets results from the fact that they were not as large at that time, in passenger volume, as the "discrete" markets selected. The Board's method was as objective a procedure for limiting scope as would have been selection of a geographic "area".

There is thus no intracircuit conflict buried in the decision below. Even if such conflict existed, it would not justify grant of the petition. Rather, any such conflict should be resolved by the Court below *en banc.* See *United States ex rel. Robinson* v. *Johnston,* 316 U.S. 649. If Delta were concerned that such a conflict existed, it should have sought rehearing *en banc* by the Court below.

CONCLUSION

The decision below is correct, was compelled by precedent, and presents no issues meriting review by this Honorable Court. The Court should therefore deny certiorari.

Respectfully submitted,

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Dated: May 11, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1274

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals (Pet. App. 16-18) and the Civil Aeronautics Board (Pet. App. 23-56, 59-73) are not yet reported.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 22) was entered on October 23, 1973. A petition for rehearing and suggestion for rehearing *en banc* were

[1] The initial decision of the administrative law judge was attached to the Board's opinion as an appendix, and was adopted by the Board except to the extent modified in its own opinion (Pet. App. 24-25). It has not been reproduced in the appendix to the petition.

547-928—74——1

denied by an order (not reproduced in the appendix to the petition) filed on November 20, 1973. The petition for a writ of certiorari was filed on February 19, 1974 (February 18 having been a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether, in selecting a carrier to provide new air services between Houston and Miami, the Civil Aeronautics Board was as a matter of law required by *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, to afford comparative consideration to applications seeking authority to provide services between Miami and points west of Houston which were already being served by the successful applicant.

STATUTE INVOLVED

Sections 401 (a) and (c) of the Federal Aviation Act of 1958, 72 Stat. 754–755, as amended, 49 U.S.C. 1371 (a) and (c) are set forth at Pet, 2–3. Also involved is Section 401(d)(1), 49 U.S.C. 1371(d)(1).

STATEMENT

In 1967, the Civil Aeronautics Board instituted a new route proceeding to consider whether there was a need for additional nonstop air service between eighteen pairs of cities in the southern transcontinental tier of states, including Houston and Miami.[2] National Airlines was then the only carrier authorized to provide nonstop service between the latter city pair.

[2] All eighteen are listed at Pet. App. 8, n. 3.

Petitioner sought to expand the proceeding by consolidating it with petitioner's application for new California-Miami authority via numerous intermediate points, including Phoenix, Albuquerque, El Paso, San Antonio, Dallas, Houston, New Orleans, and Atlanta. This would have placed in issue the need for new service in many markets in addition to the eighteen markets whose needs the proceeding was instituted to consider.

Petitioner insisted that such expansion of the proceedings was required by *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, where this Court held that one of two mutually exclusive applications for a radio license could not be granted without giving comparative consideration to both. Petitioner claims that the *Ashbacker* principle required consolidation because a carrier that obtained an extension of its routes to new cities could provide service between points on its existing routes and the new cities. Therefore, a rival of petitioner who obtained a Houston-Miami route could obtain the same authority that petitioner was seeking in its applications.[3]

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[3] As the court of appeals explained (Pet. App. 7), a carrier receiving new route authority may "tack"—or combine—its existing and new authority. For example, suppose that the Board institutes a proceeding to consider the need for new service from A to B, and one of the applicants already holds authority from B to C. If that carrier is awarded the new segment between A and B, it may, unless otherwise restricted, provide through service from A to C, so long as a stop is made at B, the segment junction point.

The Board rejected petitioner's demand for a broadened proceeding, stating that petitioner's interpretation of *Ashbacker* "'would start a chain reaction' transforming the proceeding into a * * * review of the needs of hundreds of markets in the southern tier states" (Pet. App. 9). The Board, however, invited petitioner to submit evidence in support of its contention that the award of Houston-Miami authority to another carrier would preclude the grant of petitioner's excluded applications. The court of appeals dismissed petitions for immediate review of that decision as premature. *National Airlines, Inc.* v. *Civil Aeronautics Board,* 392 F. 2d 504 (C.A.D.C.) (hereinafter *second National*). It concluded that the carrier's opportunity during the proceedings to show that in fact the grant of one application would require the denial of the other satisfied *Ashbacker.*

The Board subsequently awarded Houston-Miami authority to petitioner. The court of appeals set aside that award. *Continental Air Lines, Inc.* v. *Civil Aeronautics Board,* 443 F. 2d 745 (C.A.D.C.). After further evidentiary hearings on remand, the Board selected Continental Air Lines for the route. The Board's decision, based on a balancing of "traditional carrier selection factors" (Pet. App. 30), was "predicated primarily on the fact that * * * [Continental] will bring greater service benefits than any other applicant to the primary market [Houston-Miami] and offer superior beyond—area advantages as well" (Pet. App. 28). Specifically, it found (Pet. App. 30):

> Continental can offer a more extensive pattern of Houston-Miami nonstop frequencies—four daily round trips—than any other carrier. It can support this level of service because of its substantial pool of support traffic west of Houston. As a corollary, Continental would also provide greater beyond benefits than any other applicant, bringing first single-plane service to approximately 37,000 passengers in the Miami-Phoenix/Tucson/Midland/El Paso markets, and competitive one-stop flights to about 25,000 Miami-San Antonio passengers in 1973.

The Board rejected petitioner's contention that, having excluded its application for authority between Miami and points west-of-Houston, *Ashbacker* required the agency to restrict its award to Continental by requiring a change of plane at Houston on service between Miami and those points (Pet. App. 36–37):

> [B]oth the Board and the courts have long recognized that we are not obliged to tailor our proceedings so as to equalize the beyond-area capabilities of all applicants to a route case. While Delta does not dispute this settled doctrine its position here would undermine the principle and thereby endanger the Board's ability to control the scope of its own proceedings.

The Board also found that Continental service between west-of-Houston points and Miami will not in fact preclude the service proposed in petitioner's excluded applications. The Board adhered to this view in denying reconsideration (Pet. App. 59–73).

The court of appeals affirmed (Pet. App. 1–18). It explained (Pet. App. 13):

Delta's *Ashbacker* claim rests on the fallacy that Continental was selected for its ability to serve the needs of the excluded cities whereas it was actually selected upon evaluation of the Houston-Miami market, its need for service, and the kind of service in that market proffered by Continental, including the service made possible by Continental's backup support—for well spaced round trips daily at fare reductions, and all of the other items discussed above.

Delta was given the opportunity to make a showing of mutual exclusivity that *Ashbacker* contemplates. But that did not require putting its applications on an equal par with the backup service in fact available from Continental's existing traffic.

ARGUMENT

The decision of the court of appeals is correct, and the petition presents no issue warranting further review.

1. The decision below does not involve fundamental issues of law. The court of appeals did not question the applicability of the *Ashbacker* principle to new air route proceedings. The application of that principle to air route proceedings has resulted in a substantial body of law,[4] and the present case involves

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[4] *E.g.*, *Eastern Airlines, Inc.* v. *Civil Aeronautics Board*, 178 F. 2d 726 (C.A.D.C.); *Seaboard & W. Airlines, Inc.* v. *Civil Aeronautics Board*, 181 F. 2d 777 (C.A.D.C.); *Northwest Air-Lines, Inc.* v. *Civil Aeronautics Board*, 194 F. 2d 339 (C.A.D.C.); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 228 F. 2d 17 (C.A.D.C.); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 243 F. 2d 607 (C.A.D.C.); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 247 F. 2d 562 (C.A.D.C.); *National Airlines, Inc.* v. *Civil Aeronautics Board*, 249 F. 2d 13

merely the application of settled principles to a particular factual situation.

2. As previously indicated (N. 3, p. 3, *supra*), a carrier receiving new route authority may, unless affirmatively restricted, "tack" the new authority to its preexisting route system. It may thus operate between the new points and points it already holds authority to serve—here Miami and the four points west of Houston, via a stop at Houston.[5] In selecting an applicant for the new route the Board normally considers the public benefits which may flow from such "route integration." The additional traffic to and from the "beyond points" may enable a carrier to provide more and better service than it otherwise could in the market whose needs are under consideration.[6] In addition, route integration may result in service benefits to passengers moving to or from "beyond points," and may affect the diversionary impact that a given award will have on other carriers operating in

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(C.A.D.C.); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 275 F. 2d 632 (C.A.D.C.), certiorari denied, 362 U.S. 969; *National Airlines, Inc.* v. *Civil Aeronautics Board*, 392 F. 2d 504 (C.A.D.C.); *cf. Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 184 F. 2d 545 (C.A. 9); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 271 F. 2d 752, 756–757 (C.A. 2), certiorari denied, 362 U.S. 970; *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, 349 F. 2d 587 (C.A. 10).

[5] For example, in 1961, when Delta and National were awarded transcontinental authority, Continental was awarded a route between Los Angeles and Houston by way of Phoenix, El Paso and San Antonio (Pet. App. 4), and it would be authorized to tack its existing authority to serve the markets between Houston and those points to its new authority to serve the Houston-Miami market.

[6] See Opinion of the Board (Pet. App. 66–67).

the "beyond" markets (Houston-Phoenix route segment, for example).[7] It is settled that the Board's reliance on these considerations is entirely proper and "does not impinge upon the Ashbacker doctrine." *Frontier Airlines, Inc.* v. *Civil Aeronautics Board,* 259 F. 2d 808, 810 (C.A.D.C.)

The ability or inability of competing carriers to claim the benefit of these considerations in support of their applications in new route proceedings are the "advantages and disadvantages" which applicants bring to such proceedings by reason of their own "[p]reexisting route intricacies" (Pet. App. 10). *Ashbacker* does not oblige the Board to structure new route proceedings so as to equalize these advantages and disadvantages. *National Airlines, Inc.,* v. *Civil Aeronautics Board,* 249 F. 2d 13 (C.A.D.C.); *second National, supra.*

The practical effect of petitioner's argument, however, is to demand just such an "equalization of advantages and disadvantages" for all applicants. If petitioner's contention were accepted, in any route case in which one applicant had an advantage in ability to integrate the market at issue with its existing system, a competing applicant could nullify that advantage simply by filing a defensive application for authority to extend its routes to the same "beyond markets" from which the first carrier might be expected to derive traffic. Once such an application were filed, the Board, according to petitioner, would have only two choices. It could either consolidate the ap-

[7] See Opinion of the Board (Pet. App. 67–68).

plications and expand the scope of the proceedings or it could impose restrictions to prevent the first applicant from tacking the new route to its existing system. The court of appeals upheld the Board's refusal to follow the first alternative in this proceeding in *second National,* and upheld the decision to refrain from imposing tacking restrictions in the 1973 decision. ~~in the decision below.~~

The decision below is correct and, contrary to petitioner's assertions, does not conflict with the prior decision of the court of appeals in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 275 F.2d 632 (C.A.D.C.) (hereinafter *second Delta*).[8] In that case the court reversed the award of a St. Louis-Florida route to TWA because it concluded that the Board had improperly based the award on TWA's ability to provide Florida-California service. However, this does not mean that the Board can never make an award which will take account of or have some effect upon markets other than the market under consideration. The applicability of *second Delta* "depends on the considerations adduced by the Board in making its award." *Second National, supra,* 392 F. 2d at 510. In this case the court found that the award to Continental was based, not on its ability to serve the excluded cities, but "upon evaluation of the Houston-Miami market, its need for service, and the kind of service in that market proffered by Continental, including the service

[8] In any event the resolution of conflicts within the same circuit is not normally an appropriate function of certiorari jurisdiction. Cf. *Wisniewski* v. *United States,* 353 U.S. 901.

made possible by Continental's backup support" from traffic originating at cities west of Houston (Pet. App. 13).

3. Petitioner's contention that the Board's practice of dismissing "stale route applications" [9] prejudiced its right to a hearing has not been presented to the court of appeals and accordingly cannot be considered as a basis for certiorari. Cf. *Lawn* v. *United States,* 355 U.S. 339, 362–363, n. 16. In any event, the contention is unfounded. The Board did not rely upon the fact that petitioner's applications were technically no longer on file. It treated the applications as current for purposes of the Houston-Miami proceeding and found that the award to Continental would not, as a matter of economic fact, preclude their subsequent grant, a determination which the petition for certiorari does not challenge.[10]

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[9] Under Rule 911 of the Board's procedural regulations (14 C.F.R. 302.911), route applications more than three years old that have not been heard are dismissed without prejudice.

[10] Moreover, petitioner's argument begs the question, for it rests on the right to submit "responsive applications" (Pet. 17), *i.e.*, "applications for logically related and mutually exclusive routes" (Pet. 13). Petitioner's excluded applications were not responsive to the scope of the proceedings and, as indicated, were found not to be mutually exclusive in law or fact of the applications which did correspond to the scope of the proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 73-1274

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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CONSOLIDATED REPLY OF DELTA AIR LINES, INC.

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CONSOLIDATED REPLY OF DELTA AIR LINES, INC.

Respondent Civil Aeronautics Board (Board)[1] has late filed a brief in opposition to Delta's petition for certiorari, and several of the intervenors below have timely done so. This consolidated reply will respond to those matters on which Delta believes further elaboration is needed.

A fair summary of the position taken by the Board and intervenors on the Board's side is that the *Ashbacker*

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[1] Parties herein will be referred to by their commonly used names and references to their briefs or answers in opposition will be by party together with the page number, *e.g.*, Board p. 6.

doctrine [2] has not been violated here because Delta had an opportunity to show mutual exclusivity in a C.A.B. proceeding in which only Continental's (but not Delta's) application for new route authority between the excluded area points via Houston to Miami was heard, and that Delta allegedly failed to demonstrate economic mutual exclusivity. Delta suggests that if this be the case, we have come full circle to the situation faced and struck down by the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 228 F.2d 17 (First Delta) where a court consisting of Judges Prettyman, Miller and Danaher said:

> "The Board says the only right of Delta is to have the issue of exclusivity decided before a *grant* of Eastern's application. It so construes the *Ashbacker* doctrine. We think such an interpretation would reduce the rule of that case to an empty shell, all form and no substance. It would mean that where two applications for a license are mutually exclusive the agency could hear one of them upon its merits and in a final order rule upon exclusivity and award the license without ever hearing the merits of the second application. Such procedure would not protect the rights of the second applicant, as we read *Ashbacker*." 228 F.2d at 21 (emphasis in original).

The approach thus struck down is precisely the approach now taken by the Board as well as the airline and civic intervenors in their attempt to justify what was done by the Board below.

The questions raised by Delta's petition for certiorari are clear questions of law. The court below avoided any consideration of Delta's *Ashbacker* claim, other than the single question of whether the Board relied "in dominant

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[2] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

degree" upon beyond-benefits. The court made this quite clear, saying:

> "It would serve no useful purpose for this decision to become entangled in all of the details of Delta's objections, and what the Board counsel identifies as its change in the service it really proffers so far as the excluded points are concerned. It suffices to say that the Board decision does not rest in dominant degree upon the beyond-area benefits to the 'excluded points' ". (Appendix A, p. 12)[3]

The question is therefore directly presented whether, as a matter of law, a fair reading of the Board's opinion below reveals at least the same reliance on service "beyond the market at issue" as was involved in the *St. Louis-Southeast Case*, the administrative proceeding that led to *Second Delta*.[4] If there was such comparable reliance—and in our view there clearly was—we have a clear conflict with the rule of *Second Delta* combined with a failure to explain the *sub silentio* overruling thereof.

Although the suggestion is made (Continental, p. 13-14, El Paso, p. 11) that Delta argued Continental's selection was based "solely" on beyond-area benefits, that was not and is not Delta's argument (see Delta's Petition herein, p. 19-21). The Board referred below to several other selection of carrier criteria aimed at the local market at issue. But it was the Board itself—not Delta—which characterized the "substantial beyond-area traffic support" as "*the very factor* which has led us to select Continental" (Order 73-2-89, Appendix C, p. 34-35, also quoted in Delta's petition, p. 9-10). When the ma-

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[3] Citations to the Appendix to the within Petition for a Writ of Certiorari will be in the form "Appendix" with appropriate page citation, *e.g.*, Appendix, p. 12.

[4] *St. Louis-Southeast Service Case*, 27 C.A.B. 342 (1958).

jority tells the disenter that he is ignoring "*the* very factor"—not just "*one* of the factors"—which impelled Continental's selection, the Board is saying that the beyond-area benefits to the excluded points with the attendant higher frequencies which they would support over the Houston-Miami route, are the *sine qua non* of Continental's selection—even though other factors may have been considered and found to be in Continental's favor.

Thus, the concern of Delta as brought before this Court is certainly not what an earlier Examiner may have said (Continental, p. 9-10) nor even what the Examiner may have said below (Continental, p. 11-12) but what the *Board* said was the basis for its choice. It is axiomatic that a reviewing court will look to the substance rather than the label of an agency's action to determine what has been done. *Columbia Broadcasting Station* v. *United States*, 316 U.S. 407; *Moss* v. *Civil Aeronautics Board*, 430 F.2d 891 (C.A.D.C.). The mere fact that the Board labels a route award as one in a "local market" does not prevent the Court from recognizing it as something else when in fact it is something else. *Delta Air Lines, Inc.* v. *Civil Aeronautics Board, (Second Delta)*. Thus, though the court of appeals in *Second Delta* looked to the reality of the Board's action, it failed to do so in the proceeding below. This was directly contrary to its own precedent and, therefore, emasculated *Ashbacker* as applied to air route cases.

In view of the fact that the court of appeals never reached any question other than whether the Board's decision rested "in dominant degree on the beyond-area benefits to the 'excluded points'" (see full quotation, p. 2, *supra*), this Court need go no further in determining the validity of Delta's *Ashbacker* claim or assessing the seriousness of the question presented to airline route proceedings. Nevertheless, since Intervenor Continental

has challenged Delta's demonstration [5] of mutual exclusivity [6] it is appropriate to call the Court's attention to the clear prima facie case of mutual exclusivity which appears in the record.

Intervenor Continental contends (Continental, pp. 24-27) that Delta has not proved mutual exclusivity in a manner Continental would consider appropriate. Yet Continental ignores its own parallel *Ashbacker* contentions based on *Second Delta* as currently urged by it in another case and as set out in Appendix E (Appendix, p. 74 ff).

In demonstrating mutual exclusivity, it was not incumbent on Delta (or any carrier) to exhibit and propose every conceivable operation or routing covered by its service proposal.[7] An *Ashbacker* violation was established by the showing Delta made that even the more dense

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[5] Intervenor Continental takes the position that the Board's dismissal of Delta's "excluded applications" under Section 302.911 of the Procedural Regulations removed Delta's *Ashbacker* rights. Delta submits, however, that this dismissal had no legal significance. *Ashbacker* is satisfied only by a fair comparative hearing, *in a single proceeding. Delta* v. *C.A.B. (First Delta), supra.* If Delta is correct that its legal rights were violated, this happened as a result of the Board's action in 1967, when the Board refused to consolidate Delta's applications and the other contemporaneous proceedings into the *Southern Tier* case. Thereafter, the excluded application had no legal significance. Moreover, the applications were not withdrawn by Delta, nor by it abandoned. Rather, it was the Board which allowed the applications to remain unheard for three years and then dismissed them (without prejudice under the so-called "stale" application rule discussed in Delta's Petition here in at pp. 16-19). Delta was not then required to refile the applications—a clearly useless act.

[6] In the aviation field, the mutual exclusivity is not one of electrical interference, as in *Ashbacker*, but instead results from the economic limitations on the number of carriers which can be certificated to provide particular service requirements.

[7] See *First Delta*, where an *Ashbacker* problem was recognized even before statistical data (much less schedule proposals) had been introduced at a hearing.

traffic routings would not support Delta's proposal on top of certification of an additional carrier.

Finally, the Board and Continental (Board, p. 10; Continental, p. 16-17) would have this Court believe that Delta has raised here "for the first time" the fundamental issue of failure by the Board (and subsequently by the court below) to follow the statute by allowing responsive applications mandated by the *Ashbacker* doctrine when the Board initiates a new route proceeding *sua sponte*. (See Delta's Petition, p. 16-19.) This point was specifically raised below (Reply Brief dated July 31, 1973, pp. 8-11) in response to suggestions by the Board, Continental and others, that Delta's excluded applications were "defensive" and thereby—somehow—not entitled to consideration. Delta's arguments were not faced by the court below and require the guidance of this Court.

The petition for certiorari should be granted.

Respectfully submitted,

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